Filed 7/18/17 P. v. Gallardo CA2/1
Opinion following order vacating prior opinion

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. GIOVANNI GALLARDO et al., Defendants and Appellants.	B254090 (Los Angeles County Super. Ct. No. TA120456)
In re GIOVANNI GALLARDO, On Habeas Corpus.	B261395 (Los Angeles County Super. Ct. No. TA120456)
In re CYNTHIA ALVAREZ, On Habeas Corpus.	B261448 (Los Angeles County Super. Ct. No. TA120456)

APPEALS from judgments of the Superior Court of Los Angeles County, Richard R. Ocampo, Judge. Affirmed as modified.

ORIGINAL PROCEEDINGS; petitions for writ of habeas corpus, Richard R. Ocampo, Judge. Petitions denied.

Randy S. Kravis, under appointment by the Court of Appeal, for Defendant, Appellant and Petitioner Giovanni Gallardo.

Joshua L. Siegel, under appointment by the Court of Appeal, for Defendant, Appellant and Petitioner Cynthia Alvarez.

Kamala D. Harris and Xavier Becerra, Attorneys General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and David E. Madeo, Deputy Attorneys General, for Plaintiff and Respondent.

Juries in separate trials convicted Cynthia Alvarez and Giovanni Gallardo of two counts of first degree murder with special circumstances and found true allegations that each personally used a deadly weapon. (Pen. Code, §§ 187, subd. (a), 190.2, subd. (a)(3) & (15), 12022, subd. (b)(1).)[1] The court sentenced Gallardo to life without the possibility of parole. The court sentenced Alvarez to two consecutive terms of 25 years to life, plus one consecutive year for the weapon enhancement for a total term of 51 years to life. They each appealed.

Alvarez and Gallardo each also filed a petition for a writ of habeas corpus, asserting that they were deprived of the effective assistance of counsel. We issued an order to show cause as to each petition.

On March 29, 2016, we filed our initial opinion in this case, which we modified on April 27, 2016. On July 27, 2016, the California Supreme Court granted Alvarez's and Gallardo's petitions for review and transferred the matters to us for reconsideration of Alvarez's case in light of *People v. Franklin* (2016) 63 Cal.4th 261 (*Franklin*), and reconsideration of Gallardo's case in light of *People v. Gutierrez* (2014) 58 Cal.4th 1354

---

[1] All subsequent statutory references are to the Penal Code unless otherwise indicated.

(*Gutierrez*). We did so and, on November 17, 2016, issued an opinion addressing the *Franklin* and *Gutierrez* issues and disposing of the appeals and the habeas corpus petitions. In light of *Franklin*, we directed the trial court to determine whether Alvarez has been afforded an adequate opportunity to make a record of information that will be relevant to the Board of Parole Hearings (the Board) pursuant to *Franklin*, and, if not, to provide that opportunity. We also held that the special circumstances allegations were improper in Alvarez's case, and struck the true findings thereon. As to Gallardo's appeal, we held that *Gutierrez* did not require resentencing, and struck an unauthorized parole revocation fine. In all other respects, we affirmed the judgments and denied the writ petitions.

Alvarez and Gallardo filed petitions for review in the Supreme Court arguing that recent statutory amendments should be applied retroactively to them. The amendments, enacted by the electorate on November 8, 2016, as Proposition 57, eliminated the prosecutor's ability to file criminal charges against juveniles directly in a court of criminal jurisdiction, or adult court; instead, the juvenile court shall, upon motion, hold a transfer hearing and decide whether such charges will be adjudicated in juvenile court or adult court. The Supreme Court granted the petitions and directed us to vacate our decision, grant rehearing, and reconsider the cause in light of the following issue: "Does Proposition 57 retroactively apply to cases in which the judgment is not yet final?" The parties have filed supplemental briefs addressing this issue, which we have considered, and the matter has been reheard. For the reasons discussed below, we conclude that Alvarez and Gallardo are entitled to a transfer hearing under Proposition 57.

FACTUAL SUMMARY

A. Background

In early October 2011, Alvarez, age 15, lived in Compton with her mother, Gloria Villalta, and her stepfather, Jose Lara. Gallardo was Alvarez's 16-year-old boyfriend.

On Friday, October 14, 2011, Lara's employer, Blanca Serrano, was concerned because Lara failed to call regarding the weekend work schedule. Worried because she had not heard from him, on Monday, October 17, 2011, Serrano drove to Lara's home. When no one answered his door, Serrano inquired of Lara's neighbors. One neighbor told Serrano that Alvarez had told him Villalta was in the hospital and that Lara was with Villalta. The neighbor also told Serrano that she had seen Alvarez throwing pictures and tools in the garbage. Another neighbor told Serrano that he had seen Lara's truck behind a Home Depot.

When Serrano found Lara's truck at a nearby Home Depot with the windows open she called the police. Serrano also called Villalta's oldest daughter, Dayana Villalta, but she had no information about her mother and Lara's whereabouts.

On Tuesday, October 18, a Los Angeles County deputy sheriff met Dayana at Alvarez's residence. The house appeared to have been ransacked, although there was no sign of forced entry. Clothes were strewn about, and the home smelled of rotting food. Neighbors reported that they had not seen Villalta or Lara for several days.

The deputy found a notebook in the living room with the following phrases written on separate pages in handwriting large enough to be visible from across a room: "I am to[o] scared[.] I cannot do it. Me what?" "[D]o you think you can kill her in bed?" "What about [i]f she going to her bed can you kill her?" "She is setting down." "You do it." The deputy also found a permit dated

October 17, 2011, authorizing Gallardo to leave school early for medical reasons.

Meanwhile, on October 15, other deputies found a female body partially-buried in the yard of an abandoned house in Norwalk. The woman's face was covered with a towel secured by duct tape. Her legs were bound above her ankles by duct tape and her wrists were bound by a bungee cord and masking tape. Nearby, deputies found a pair of gardening gloves. An autopsy revealed signs of strangulation and blunt force trauma. The body was eventually identified as Villalta's.

On Wednesday, October 19, 2011, sheriff's deputies interviewed Alvarez and Gallardo.

B. Alvarez's Police Interview[2]

Alvarez initially told the deputies a story that she later admitted Gallardo and she had fabricated together a day earlier. Alvarez said that on the preceding Wednesday (October 12), Lara told her that Villalta went to the hospital for eye surgery and did not want any visitors. On the following Saturday or Sunday, Lara pulled a gun on Alvarez and Gallardo and forced them to throw out Villalta's possessions, including her clothes and pictures. Alvarez said she last saw Lara on Monday, October 10. She told the deputies that she was worried about her mother and wanted to find out what happened to her.

After giving Alvarez the *Miranda*[3] warnings, the deputies showed her the notebook found at her home and pointed out the

---

[2] Alvarez's statements to deputies were admitted at Alvarez's trial only. And an audio-video recording of the interview was played for the jury.

[3] *Miranda v. Arizona* (1966) 384 U.S. 436.

pages with the phrases, "I am to[o] scared[.] I cannot do it. Me what?" and "[D]o you think you can kill her in bed?" Alvarez admitted that the notebook was hers, and then told the deputies the following information.

In the two weeks before the murders, Alvarez and Gallardo had talked about killing Villalta and Lara. Gallardo first raised the idea after Alvarez told him that Lara had raped her. Alvarez said she "liked the idea" of killing them, "but at the same time, [she] didn't."

On the day of the murders, Villalta was cooking in the kitchen when Gallardo arrived at the house. Gallardo said that they should kill Villalta and Lara, but Alvarez said, "no." At around 7:30 or 7:45 in the evening, Alvarez went outside while Gallardo killed Villalta "using alcohol." When Gallardo called Alvarez back inside, she saw Villalta's body on the floor in a bedroom. Gallardo then tied the body with duct tape.

When Lara arrived home between 8:00 and 8:30 that evening, he came in the house, but then walked outside to talk to a neighbor. Gallardo hid behind a door. When Lara came back inside, Gallardo hit him twice in the head with a baseball bat. While Lara was unconscious, Alvarez hit him seven times on his legs with the bat. Gallardo told Alvarez to get the alcohol, which Gallardo put in Lara's mouth and nose. When Lara appeared to regain consciousness, Gallardo pulled a knife from his pocket and stabbed Lara repeatedly, killing Lara. Gallardo then dragged Lara's body next to Villalta's and wrapped it in a blanket.

That night, Alvarez and Gallardo "drag[ged] the bodies" into Villalta's Jeep. They drove to a vacant lot about four blocks away, dug a hole, dragged Lara's body into it, and covered it with dirt. They could not fit Villalta's body into the same hole. Sometime later, they buried Villalta's body in the yard of an abandoned house.

Alvarez and Gallardo stripped Lara's truck of some parts, sold the parts, and then left the truck at a Home Depot. Gallardo got rid of the bat and the knife. Later, they abandoned Villalta's Jeep.

Near the end of the interview, the following colloquy took place:

"[Deputy] Bernstein: [Gallardo] brings it up, he says this guy's hurt you, I love you, and I wanna fuck this guy up that hurt somebody I love.

"Alvarez: Yeah.

"[Deputy] Bernstein: And I wanna kill this person.

"Alvarez: Yeah.

"[Deputy] Bernstein: And at some point you said, 'Yeah, let's do it.'

"Alvarez: Uh-huh.

"[Deputy] Bernstein: And you had all these weeks to think about it, right?

"Alvarez: Yeah.

"[Deputy] Bernstein: And you had all these weeks to tell somebody or to run away from him or change—

"Alvarez: No, he would still find me." (Capitalization omitted.)

C. Gallardo's Police Interview[4]

After waiving his *Miranda* rights, Gallardo told the deputies that Lara had taken Villalta to the hospital and later threatened Gallardo with a gun. A deputy interrupted Gallardo and told him they initially heard the same story from Alvarez, but then "got the real story" and that deputies had "found the spot" where Gallardo

---

[4] Gallardo's statements to deputies were admitted at Gallardo's trial only. An audio-video recording of the interview was played for the jury.

buried Lara. Gallardo said, "Oh damn." He then told the deputies the following.

Gallardo was angry at Villalta and Lara. Lara had raped Alvarez, disrespected Gallardo's family, threatened him, and called "the cops" on him. Villalta had yelled at Gallardo's father and treated Alvarez poorly. So Gallardo "got revenge" and "killed them both."

Alvarez and Gallardo had talked about killing Villalta and Lara for a couple of weeks. On the day of the murders, Gallardo arrived at Alvarez's home at about 4:30 in the afternoon. He brought a backpack containing a bottle of rubbing alcohol, a towel, an aluminum baseball bat, and a Halloween mask. Villalta was cleaning and making food. When Villalta went to the restroom, Alvarez told him, " 'Oh, go, go quick.' " Gallardo soaked the towel with the rubbing alcohol, walked up behind Villalta, and put the towel over her mouth. Villalta fell to the ground and Gallardo choked her with his hands until she was dead.

Gallardo bound Villalta's arms and legs with duct tape. He and Alvarez then dragged Villalta's body to Lara's room. At some point, Gallardo taped the alcohol-soaked towel to Villalta's face and took a gold bracelet from her arm. They looked for and found Alvarez's iPod, which Villalta had previously taken from Alvarez.

While Alvarez and Gallardo waited for Lara to come home, they watched television and talked.

When Lara arrived home around 9:00 p.m., Gallardo was waiting in Lara's room with a knife and the baseball bat in his hands. Alvarez was lying on the couch in the living room. When Lara walked in, Gallardo hit Lara in the face twice with the bat. He then stomped on Lara's face and choked him. After he knocked him unconscious, Gallardo "wrapped him up with tape."

Lara regained consciousness and struggled with Gallardo. Alvarez then hit Lara with the bat. Gallardo asked Alvarez to give

him a knife that was on a table in the living room. Alvarez got the knife and handed it to Gallardo. Gallardo then stabbed Lara in the back and chest three or four times. After Lara died, Alvarez and Gallardo wrapped his body in a blanket.

At around 1:00 a.m., Alvarez and Gallardo put both bodies and a shovel in the back of Villalta's Jeep and drove to a field. They dug a hole and buried Lara. They returned to Alvarez's home and slept. Villalta's body remained in the Jeep parked on a nearby street.

The next evening, Alvarez and Gallardo drove to an abandoned house where they buried Villalta's body in the yard.

Two days later, they drove Lara's truck to a location away from the home and removed two batteries and the alternator. They sold the items for $36, which they used to buy gas for the Jeep.

Alvarez and Gallardo found gold jewelry at Alvarez's home, which they sold for $440. They spent the money to buy food and other items for a Halloween party they planned for their friends.

At some point, Lara's employer came to Alvarez's house and knocked on the door while they were inside. Later, Gallardo threw the baseball bat into the yard and put the knife in a trash can. They drove the Jeep to a nearby street and abandoned it. As they walked away, they threw the keys over a fence into the backyard of a residence.

D. Additional Prosecution Evidence

After the interviews, Gallardo directed deputies to places associated with the murders. He showed them: The spot where he threw away the shovel he used to dig the graves (no shovel was recovered); Villalta's Jeep, which was still parked where they abandoned it; the fence over which they had thrown the Jeep's keys (the keys were retrieved from the property's owner); Alvarez's home, where the murders took place; the spot where they had

parked the Jeep with Villalta's body inside; the area where Gallardo discarded the baseball bat (deputies recovered the bat from that spot); the Home Depot location where they abandoned Lara's truck (by then, deputies had impounded the truck); the field where they buried Lara; and the yard of the abandoned house where they had buried Villalta.

While Alvarez and Gallardo were at the Norwalk site, they met with the detective who had been overseeing the investigation there. Gallardo told the detective that he and Alvarez left a blanket in a shed on the property.[5] They had used the blanket to keep the victims' blood from staining the Jeep. The detective found and recovered the blanket from the shed. The blanket matched a set that was in Villalta's bedroom. The detective asked Gallardo about the gloves found near the body. Gallardo said he used a pair of gloves and discarded them at the scene.

On the day Alvarez and Gallardo were interviewed, homicide detectives searched Alvarez's house. They found blood stains on the floor, on a couch, and on a mop. In a nearby field they found a baseball bat with blood on it. They also found a backpack, empty jewelry boxes, a Halloween mask, and Halloween party supplies.

Detectives examined Lara's truck and found that the battery and alternator had been removed. They also found sales receipts for two batteries and an alternator.

---

[5] Although a deputy testified at each defendant's trial about the car ride with Gallardo, including the places they went and the evidence they found, Gallardo's statements during the ride and at the Norwalk site were not introduced at Alvarez's trial.

E. Alvarez's Defense Evidence

1. Alvarez's Testimony

Alvarez testified at trial as follows. Prior to the murders, Gallardo had talked about killing Villalta and Lara, but Alvarez did not think "he was that type of person." On the day of the murders, Gallardo arrived at Alvarez's house wearing a black mask and a backpack. She met him outside while taking out the trash and brought him a beer. Gallardo told Alvarez he "was coming to kill [Alvarez's] parents." She told him, "no," and went back inside. Gallardo stayed outside for some time. While Villalta was in her bedroom, Alvarez invited Gallardo to come in.

Gallardo hid in a storage room, adjacent to the living room, when Villalta returned to the kitchen. Alvarez sat on a couch, where she could see Gallardo and write the notes the sheriff's deputies later found. Gallardo made motions and hand gestures to her, which she understood meant that he was going to kill Villalta. Alvarez wrote her notes to communicate with Gallardo without Villalta hearing them.

Alvarez wrote, "She is setting down" to tell Gallardo that Villalta was sitting down in the kitchen. She wrote, "I am to[o] scared[.] I cannot do it. Me what?" because she was scared of Gallardo. When she wrote, "If she going to her bed can you kill her," she meant, "I'm not going to do it, because I didn't want to see what he was going to do to her" and "I didn't want to see it in front of my face because I might have flashbacks." On direct examination, Alvarez testified that she wrote, "[D]o you think you can kill her in bed," for the same reason. On cross-examination, she agreed with the prosecutor's suggestion that she wrote it because she thought it would be easier to kill Villalta while Villalta was sleeping.

Alvarez wrote, "You do it" in response to Gallardo's gestures indicating that she should "do it." She meant, "I'm not gonna be involved in anything."[6]

When Villalta went to the bathroom, Alvarez made a gesture with her hand to signal Gallardo "to go." While Gallardo walked down the hall toward Villalta, she left the house.

Gallardo called Alvarez back inside where she saw Villalta's body on the floor. He wrapped Villalta's face in a towel and taped her hands and feet. Alvarez did not touch Villalta or "take any action to kill her."

When Lara arrived home, he used the restroom, and then walked outside to talk to neighbors. Alvarez told Gallardo, "I just can't do it." Gallardo told her to go to the couch; she did, and pretended to sleep. When Lara returned, Gallardo hit him twice in the head with a bat. Lara fell to the floor, and Gallardo got on top of him. When Gallardo called Alvarez for help, she used the bat to hit Lara on his lower body about seven times. To prevent Lara from defending himself, Alvarez kicked away from Lara a folding knife that had fallen out of Lara's pocket.

Gallardo told Alvarez to get a knife. She retrieved a knife from the kitchen and gave it to Gallardo. Alvarez did not know what he was going to do with it. Gallardo stabbed Lara with the knife at least seven, and possibly as many as 11, times.

After Lara died, Gallardo bound Lara's arms behind his back, wrapped the body in a blanket, and put both bodies in the Jeep. With Alvarez in the passenger seat, Gallardo drove to the spot

---

[6] The notebook also included a handwritten note stating: "Live or Die," in writing much smaller than the notes used to communicate with Gallardo. Alvarez testified that she wrote this note "[a] long time ago," when she was thinking about killing herself.

where they buried Lara. Gallardo dug the hole and lifted and dragged Lara's body to the grave; Alvarez merely put dirt on top of the body. They drove back to Alvarez's house, where they left Villalta's body in the Jeep overnight. They then cleaned and mopped the house.

The next day, Alvarez and Gallardo went to school, but did not attend classes. That night, they drove the Jeep looking for a place to bury Villalta. They went to a park, but the ground was too hard and they returned to Alvarez's home. The next day, they again went to school without attending classes. In the evening, Alvarez and Gallardo drove to an abandoned house in Norwalk and dug a hole in the yard where they dumped Villalta's body. Alvarez helped cover Villalta's body with dirt, but it was too dark to see whether they covered it completely. At Gallardo's request, Alvarez removed a blanket from the Jeep and left it inside a shed on the property.

The next day, Alvarez threw away items that had blood on them, and Gallardo threw away Villalta's clothes and pictures. Alvarez told a neighbor that Villalta was in the hospital.

Alvarez testified that she acted out of fear of Gallardo based on his history of aggression and violence toward her. Gallardo, she said, would hit her, choke her, pull her hair, and call her names. About a month before the killings, Gallardo put a knife to Alvarez's throat during an argument. On another occasion, Gallardo brought a gun to school and put it to her head. Gallardo once made Alvarez swallow some pills, which made her feel "weird"; he then had sex with her and, because of the drugs, she "couldn't do anything about it."

Alvarez also testified about how she had been abused by Villalta and Lara. Villalta hit and yelled at her, and rarely let her be with friends. Lara touched her where she "shouldn't be touch[ed]" on more than 30 occasions and, in 2007 or 2008, raped

her. Alvarez either failed to report the sexual abuse to authorities or, when she did, she obeyed Villalta's demand that she deny the incidents. She ran away from home several times, but each time Lara would find her.

Alvarez testified that despite the conduct of her parents, she did not want them killed, did not want Gallardo to kill them, and did not want to help or encourage Gallardo to kill them.

2. Other Alvarez Defense Evidence

Alvarez presented numerous witnesses who testified as to her character for being quiet, nice, polite, and shy, corroborated her testimony about Villalta's and Lara's physical and sexual abuse, and testified about Gallardo's history of aggression and violence. As we discuss below, the court also limited and excluded certain character evidence.

Dr. Nancy Kaser-Boyd, a forensic psychologist, had interviewed Alvarez and reviewed school records, police reports, and the records of social services agencies pertaining to Alvarez. Dr. Kaser-Boyd administered a variety of tests to Alvarez, including I.Q., Rorschach (ink blot) tests, and a personality assessment inventory. Alvarez had a verbal I.Q. score of 86, placing her in the lowest 14th percentile of persons her age. This was consistent with Alvarez's school records that showed she performed "well below average" in verbal reasoning. Alvarez's perceptual reasoning and overall I.Q. scores were in the "average range." Rorschach and personality tests indicated that Alvarez had suffered child abuse, was depressed, and viewed herself as damaged. Dr. Kaser-Boyd explained that abused children often feel worthless, helpless, and vulnerable, which can lead to domination and revictimization by new abusers. Alvarez showed no signs of aggression or antisocial personality.

F. Gallardo's Defense Evidence

Gallardo presented two defense witnesses: Dr. Deborah Miora, a forensic neuropsychologist, and Gary Steiner, a retired police officer. Dr. Miora testified that Gallardo had been in special education classes since the third grade and had developmental disabilities. Gallardo's I.Q. score was 57, which indicates an "extremely low range of intellectual ability consistent with those who have mild to moderate mental retardation." Dr. Miora had not, however, made a formal diagnosis of mental retardation. On other tests, Gallardo scored in the average range.

Steiner testified about police interview tactics and concerns he had regarding Gallardo's police interview. He testified that leading questions can be "problematic," and the use of two detectives, as in Gallardo's case, is naturally coercive. Juveniles, such as Alvarez and Gallardo, may not understand their rights and the implications of discussing their crimes, and may admit to acts they did not do.

DISCUSSION

I. Alvarez's Appeal

A. Special Circumstances Findings

In connection with each murder count, the jury found true allegations of special circumstances. (§ 190.2, subds. (a)(3) [multiple murders] & (a)(15) [lying in wait].) Alvarez contends that the charge and convictions of special circumstances were error. The People concede the error, but contend that it had no effect. We agree.

Generally, when a defendant is guilty of murder in the first degree and the jury finds any "special circumstances," the defendant is punished by death or life in prison without the possibility of parole (LWOP) (§ 190.2, subd. (a)); in the absence of a

special circumstance, the sentence is imprisonment for 25 years to life (§ 190, subd. (a)). When the defendant is 14 or 15 years old, however, an LWOP sentence may not be imposed and the only authorized sentence is a term of 25 years to life with the possibility of parole. (*People v. Demirdjian* (2006) 144 Cal.App.4th 10, 17; § 190.5.) Alvarez was 15 years old at the time of the crime, and the court correctly sentenced her on each count to 25 years to life with the possibility of parole.

Because a true finding on the special circumstances allegations could not effect Alvarez's punishment and the allegations had no other lawful purpose, they should not have been charged. (See *People v. Spears* (1983) 33 Cal.3d 279, 283 [juvenile could not be charged with special circumstances when statutory scheme did not permit death or LWOP for juveniles].) The trial court acknowledged that because Alvarez was 15 years old at the time she committed the crimes, the maximum sentence he could impose on each count was 25 years to life, and the court so sentenced her. The minute order, however, states that the court stayed the lying in wait special circumstance. Because the allegation and the finding thereon were unauthorized, we will strike this portion of the judgment. The abstract of judgment correctly describes Alvarez's sentence and makes no mention of the special circumstances findings; therefore, no other modification is required.[7]

---

[7] Under a separate heading, Alvarez argues that the court erred by failing to give CALCRIM No. 702, which instructs the jury that in order to find true the multiple murder special circumstance allegation, the jury must find that the defendant acted with the intent to kill. Because we conclude that it was error to charge the special circumstances and the true findings thereon are stricken, this argument is moot.

B. Denial of Motion to Continue Trial

On February 26, 2013, Alvarez moved to continue the trial until June or July 2013 on the ground that Nancy Piña, a speech and language therapist who had been working with Alvarez to help her to testify at trial, was having knee replacement surgery on March 27, 2013, and would be unavailable for three months thereafter. Alvarez's counsel explained that Piña had been retained to get Alvarez "in a position where she can articulate well enough to testify." Counsel said she may also have Piña testify to rebut any prosecution evidence that Alvarez "was perfectly articulate" during her police interview. Counsel explained that Alvarez has difficulty expressing herself and, as a result, she did not "lay out her whole history" in the police interview. The court asked counsel to attempt to locate a replacement for Piña.

The court and counsel took up the matter again the next day. Counsel stated that she could not find an expert to replace Piña. The court then ruled, "based on the offer of proof," that there was good cause to continue the trial to April 15, 2013, but found that a continuance to June or July was "too long a time for the court to delay" the trial. Trial commenced on April 22.

Alvarez contends that the denial of a continuance constituted an abuse of discretion and a violation of her right to due process. We disagree.

A trial court may continue a trial only upon a showing of good cause. (§ 1050, subd. (e); *People v. Doolin* (2009) 45 Cal.4th 390, 450.) "When a continuance is sought to secure the attendance of a witness, the defendant must establish '[s]he had exercised due diligence to secure the witness's attendance, that the witness's expected testimony was material and not cumulative, that the testimony could be obtained within a reasonable time, and that the facts to which the witness would testify could not otherwise be proven.' [Citation.]" (*People v. Jenkins* (2000) 22 Cal.4th

900, 1037.) The court has broad discretion to determine whether good cause exists, and such discretion " 'is abused only when the court exceeds the bounds of reason, all circumstances being considered.' " (*People v. Fuiava* (2012) 53 Cal.4th 622, 650, quoting *People v. Beames* (2007) 40 Cal.4th 907, 920.)

On review, we consider the circumstances of the case and the reasons presented for the request to determine whether the denial of a request for continuance was so unreasonable as to deny due process. (*People v. Doolin*, *supra*, 45 Cal.4th at p. 450.) Here, it appears that Piña had two roles: First, to help Alvarez prepare to testify at trial; and second, to possibly testify herself to explain why Alvarez at the police interview had difficulty articulating her story. Regarding the first role, as the court explained, Piña could continue to work with Alvarez until her surgery on March 27, 2013. Regarding the second role, the court reasonably concluded that counsel could, with due diligence, obtain a substitute expert in the six weeks that remained before the new trial date and, in any case, the evidence Piña was expected to provide was not material. Indeed, it appears from counsel's argument at the hearing that Piña was expected to testify, if at all, only about the difficulty Alvarez had expressing herself during the police interview. The court could have reasonably concluded that the recording of Alvarez's interview was sufficient to demonstrate to the jury her ability to articulate her thoughts. The court did not abuse its discretion.

C. Exclusion of Post-Murder Character Evidence

Before trial, the prosecution moved to exclude testimony regarding Alvarez's character from witnesses who came to know her after the murders—i.e., while she was detained in juvenile hall. Alvarez asserts that these witnesses would have testified to her "character for nonviolence and honesty" to support her theory that the killing of her parents was "out of character" for her, and to add

credibility to her testimony that she lacked the intent to aid Gallardo. The court initially indicated that evidence of Alvarez's character before the incident and up to "a few days after" the incident was relevant, but testimony from a witness who knew Alvarez one month after the incident was not relevant. Alvarez's counsel responded by stating that she planned to call witnesses who have had recent daily or weekly contact with Alvarez and have formed opinions about her character. The court then ruled that character evidence elicited from people who knew Alvarez before the incident and "right after the incident" was relevant and would be admitted, but evidence of her character thereafter, such as testimony from people in juvenile hall, was not relevant and would not be admitted. The court also indicated that it would reconsider its ruling if counsel provided authority for her position. Counsel did not come forward with any authority or further argument.

Relevant evidence is evidence that has a "tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) Trial courts have broad discretion to determine the relevance of evidence, and we will not disturb the court's exercise of that discretion unless the court acted unreasonably. (*People v. Jones* (2013) 57 Cal.4th 899, 947.) Here, the court could reasonably conclude that evidence of Alvarez's nonviolent and honest character while in detention after the murders had no tendency to prove or disprove her mental state or conduct at the time of the murders. The court's ruling was not an abuse of discretion.

Even if the court erred in excluding post-incident evidence of Alvarez's character, Alvarez has not established that the trial was fundamentally unfair or that she would have obtained a more favorable result if the evidence had not been excluded. (See *People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Partida* (2005) 37 Cal.4th 428, 439 [absent fundamental unfairness, state law error

in ruling on evidence is subject to *Watson* standard].) Undisputed or compelling evidence establishes that Alvarez was aware of and shared Gallardo's intent to kill her parents, and that she acted to aid and abet Gallardo in killing Villalta and participated in the killing of Lara. Alvarez and Gallardo had previously discussed killing them. On the evening of the murders, Alvarez let Gallardo into the house after he informed her that he was there to kill them. Alvarez allowed Gallardo to hide in a room out of Villalta's view as Alvarez and Gallardo communicated about killing Villalta via gestures and Alvarez's notes. When Villalta walked down the hall, Alvarez indicated to Gallardo "to go," i.e., to go kill Villalta, while Alvarez went outside to avoid seeing the murder take place. After Gallardo killed Villalta, Alvarez helped Gallardo kill Lara by hitting Lara with a baseball bat and either kicking a knife away from Lara's reach or handing a knife to Gallardo, or both. In light of the strength of the evidence and the inferences drawn therefrom, it is not likely that evidence of Alvarez's character from those who knew her only after the murders would have produced a more favorable result. Therefore, even if the court's ruling was erroneous, reversal is not required.

D. Exclusion of Evidence of Gallardo's Character and Culpability

Alvarez contends that the court erred by excluding evidence of other violent incidents by Gallardo and Gallardo's "character for violence, jealousy, and possessiveness toward" Alvarez. In particular, Alvarez points to evidence she proffered of: (1) testimony from the dean of students at Alvarez's and Gallardo's high school regarding Gallardo's character; (2) Alvarez's statement that she had told Gallardo that her parents tied her up after she ran away from home; and (3) testimony from one of Gallardo's former friends about Gallardo's character for jealousy and violence, and of a fight Gallardo and Lara had during Alvarez's Quinceanera

party. In addition, when Dayana (Alvarez's sister) was asked whether she had ever heard Gallardo threaten Alvarez, she responded that Gallardo had threatened her (i.e., Dayana). The court struck the answer as nonresponsive, and Dayana was not permitted to say more about the threat to her.

Alvarez contends that the excluded evidence was relevant and "crucial" to her defense that she lacked the intent to aid Gallardo's murders. She further asserts that the exclusion of the evidence deprived her of the ability to present a defense and her right to due process. We review the court's evidentiary rulings for an abuse of discretion. (*People v. Gonzales* (2012) 54 Cal.4th 1234, 1256-1257; *People v. Robinson* (2005) 37 Cal.4th 592, 625.)

None of the challenged rulings were an abuse of discretion or deprived Alvarez of a defense. The court reasonably concluded that Evidence Code section 352 barred these topics because they were more time consuming than probative. In any case, if error, the rulings were harmless for the reasons discussed in the preceding section—it is not likely that Alvarez would have obtained a more favorable result if the proffered evidence was introduced. Moreover, Alvarez was permitted to introduce numerous incidents of Gallardo's violence toward her to support her defense that she acted out of fear of Gallardo. Alvarez testified, for example, that Gallardo hit her, choked her, pulled her hair, put a knife to her throat, brought a gun to school and put it to Alvarez's head, and made her take pills to have sex with her against her will. The challenged rulings did not deprive Alvarez of a defense.

E. Exclusion of Evidence of Villalta's and Lara's Abuse

Alvarez was permitted to introduce evidence that Lara had sexually abused her and evidence that Villalta had physically and verbally abused her. The court, however, ultimately limited such evidence and excluded other evidence bearing upon the character of

the victims. For example, regarding testimony from Dayana about Alvarez's statements to her concerning sexual abuse, the court stated that it would allow Dayana to testify generally as to what Alvarez told her, but not "the gory details of what she said." Alvarez points to several examples of excluded evidence, including the following. After Alvarez testified that Villalta abused her, she was not permitted to answer the questions: "What kind of abuse?" and "Did she hit you?" Alvarez was not permitted to introduce evidence that Villalta had lit a newspaper on fire and burned Alvarez's nose and face or that Lara had danced with Alvarez at her Quinceanera party in June 2011. Dayana was not permitted to testify that when Alvarez was five years old she saw Lara behaving inappropriately with Alvarez in bed or whether she had ever seen Lara do anything sexually inappropriate to Alvarez. Dayana was also not permitted to testify that Lara has sexually propositioned her or to testify generally as to Lara's character. In each instance, the court ruled that the proffered evidence was irrelevant or inadmissible under Evidence Code section 352.

In response to defense counsel's argument that the "whole history of sexual abuse" was relevant to Alvarez's state of mind at the time of the murder, the court stated that the evidence was not offered "to prove a defense" or to "reduce[] her conduct for murder." Moreover, by the time Dayana's testimony was offered, the jury had already "heard about [Alvarez's] belief that she was molested multiple times and physically abused by her mother."

Alvarez contends that the evidence of the victims' abusive character was relevant because it supported her defense that she lacked the intent to aid by showing that Gallardo had a motive to commit the killings "on his own." This argument is unsupported by authority and is without merit. Even if Gallardo had "his own" motive for killing Alvarez's parents, that fact does not diminish Alvarez's culpability for Gallardo's murders.

Alvarez further contends the evidence was relevant to show that she acted in the heat of passion, which would have reduced the offense to manslaughter. We disagree. A murder may be reduced to manslaughter based upon the heat of passion when, at the time of the killing, the defendant's reason was obscured or disturbed by passion, induced by provocation, "to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment." (*People v. Barton* (1995) 12 Cal.4th 186, 201.) The defendant must have killed "while under 'the actual influence of a strong passion' induced by such provocation." (*People v. Moye* (2009) 47 Cal.4th 537, 550.) Thus, even when there is evidence of sufficient provocation, a homicide is not manslaughter " ' "if sufficient time has elapsed between the provocation and the fatal blow for passion to subside and reason to return . . . ." [Citation.]' [Citation.]" (*Ibid.*)

Here, no evidence proffered or introduced even suggested that any of the physical or sexual abuse Alvarez suffered was recent, let alone proximate, to the killings or that Alvarez participated in the crimes while under the actual influence of passion induced by any provocation. Indeed, the evidence is undisputed that Villalta was cooking soup in the kitchen in the moments before she was killed, and Lara had merely arrived home from work and had no recent contact with Alvarez prior to his murder. Alvarez's argument on this point is without merit.[8]

---

[8] Under a separate heading, Alvarez argues that the court erred in denying her request for jury instructions on voluntary manslaughter. Because there was no substantial evidence to support such an instruction, the court did not err in denying the request.

F. Erroneous Instruction on Natural and Probable Consequences

The court instructed Alvarez's jury with CALCRIM No. 400 as follows:

"A person may be guilty of a crime in two ways. One, he or she may have directly committed the crime. I will call that person the perpetrator. Two, he or she may have aided and abetted a perpetrator, who directly committed the crime.

"A person is guilty of a crime whether he or she committed it personally or aided and abetted the perpetrator.

"Under some specific circumstances, if the evidence establishes aiding and abetting of one crime, a person may also be found guilty of other crimes that occurred during the commission of the first crime."

As Alvarez points out, the last sentence in the instruction refers to the natural and probable consequences doctrine by which an aider and abettor may be liable for unintended, but reasonably foreseeable offenses committed by the person she aids and abets. (See *People v. McCoy* (2001) 25 Cal.4th 1111, 1117; *People v. Rivas* (2013) 214 Cal.App.4th 1410, 1432 (*Rivas*).) According to the bench notes for the instruction, this language should be given to the jury only if "[t]he prosecution is also relying on the natural and probable consequences doctrine." (Judicial Council of Cal. Crim. Jury Instns. (2014) Bench Notes to CALCRIM No. 400, p. 155.) In that situation, the court should further instruct with CALCRIM No. 402 or No. 403. (*Rivas*, *supra*, 214 Cal.App.4th at p. 1432.) Here, as the Attorney General concedes, the prosecution did not rely on the natural probable consequences doctrine and the court did not further instruct as to that doctrine. Instructing with the last sentence when the prosecution did not rely on the natural and probable consequences doctrine and the jury was not further

instructed on the doctrine was error. (*Id.* at p. 1433.) The error, however, was harmless.

A similar error was found harmless in *Rivas*, *supra*, 214 Cal.App.4th 1410. In that case, as here, the prosecution did not rely on the natural and probable consequences doctrine to prove the defendant's guilt. (*Id.* at p. 1434.) The last sentence of CALCRIM No. 400 was, therefore, "superfluous and, without clarification through CALCRIM No. 403, meaningless." (*Rivas*, *supra*, at p. 1433.) Giving the superfluous instruction was, however, harmless " 'because there [was] no reasonable likelihood the jury misunderstood or misapplied the law.' " (*Id.* at p. 1434.)

The *Rivas* court relied on *People v. Letner and Tobin* (2010) 50 Cal.4th 99 (*Letner*). In *Letner,* the trial court gave the jury an instruction regarding the natural and probable consequences doctrine without identifying the "target" offenses. (*Id.* at p. 183.) As such, the instructions were incomplete, ambiguous, and erroneous. (*Id.* at pp. 183-184.) The defendant argued that the instruction could have led the jury to indulge in unguided speculation concerning the unspecified target offenses. (*Id.* at p. 184.) The issue, however, was not what the jury could have done, but whether there was "a reasonable likelihood that the jury did so." (*Ibid.*) The Court concluded that there was no such likelihood and that the error was therefore harmless. (*Ibid.*)

The reasoning in *Rivas* and *Letner* applies equally here. As in those cases, the prosecution did not rely on the natural and probable consequences doctrine. (See *Letner*, *supra*, 50 Cal.4th at p. 184; *Rivas*, *supra*, 214 Cal.App.4th at p. 1434.) Although the inclusion of the last sentence of CALCRIM No. 400 was superfluous and, therefore, should not have been given, it is not reasonably likely that the jury misunderstood or misapplied the law. Any error was therefore harmless.

G. Aiding and Abetting and Implied Malice Instructions

The Alvarez jury was instructed on aiding and abetting with CALCRIM No. 401 as follows:

"To prove that the defendant is guilty of a crime based on aiding and abetting that crime, the People must prove that:

"1. The perpetrator committed the crime;

"2. The defendant knew that the perpetrator intended to commit the crime;

"3. Before or during the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime;

"AND

"4. The defendant's words or conduct did in fact aid and abet the perpetrator's commission of the crime."

The court also instructed the jury on murder and malice aforethought with CALCRIM No. 520 as follows:

"There are two kinds of malice aforethought, express malice and implied malice. Proof of either is sufficient to establish the state of mind required for murder.

"The defendant acted with express malice if (he/she) unlawfully intended to kill.

"The defendant acted with implied malice if:

"1. She intentionally committed an act;

"2. The natural and probable consequences of the act were dangerous to human life;

"3. At the time she acted, she knew her act was dangerous to human life;

"AND

"4. She deliberately acted with conscious disregard for (human/[or] fetal) life.

"Malice aforethought does not require hatred or ill will toward the victim. It is a mental state that must be formed before the act that causes death is committed. It does not require deliberation or the passage of any particular period of time."

Although each instruction is legally correct, Alvarez contends that, read together, the instructions could have misled the jury to believe that Alvarez could be liable for murder as an aider and abettor without having the intent to kill. The jury could have found, Alvarez argues, that she was liable as an aider and abettor even if she had only the intent and knowledge required for implied malice; that is, the intent to commit an act she knew was dangerous to human life. In that case, she contends, she would not have "share[d] the murderous intent of the actual perpetrator," as required for aiding and abetting liability for murder in the absence of the natural and probable consequences doctrine. (See *People v. McCoy*, *supra*, 25 Cal.4th at p. 1118.)

The problem with Alvarez's argument is that she was not, as she asserts, "charged with directly aiding-and-abetting" murder; she was charged with murder "with malice aforethought." Murder may, of course, be committed directly, as well as by aiding and abetting another; and malice aforethought may be express or implied. Significantly, the prosecution in this case relied not only on the theory that Alvarez *aided and abetted* Gallardo's perpetration of the murders (and shared his intent to kill), but also that Alvarez's acts *proximately caused* her parents' deaths and that she committed such acts with express or implied malice.

Regarding Villalta's murder, the prosecutor argued that Alvarez caused Villalta's death by inviting Gallardo into the house knowing that he planned to kill her parents, writing the incriminating notes to Gallardo, and gesturing to him "to go" kill Villalta. In doing so, the prosecutor explained that Alvarez acted with implied malice because "the natural consequences of her

actions . . . were dangerous to human life . . . [a]nd she knew that it was dangerous to human life, and she deliberately acted with conscious disregard for human life." Regarding Lara's murder, the prosecutor argued that Gallardo "needs a knife, and [Alvarez] goes and gets a knife. She gets a knife to let [Gallardo] finish him off. . . . Those are the actions of this defendant." In short, although it was Gallardo's hands that choked Villalta and stabbed Lara, Alvarez directed Gallardo down the hall at the right time to kill Villalta and handed Gallardo the knife used to kill Lara. These actions are sufficient to constitute a "proximate cause" of the victims' deaths as an alternative to the theory of aiding and abetting. (See *People v. Roberts* (1992) 2 Cal.4th 271, 315-322; CALCRIM No. 240.) Thus, even if an implied malice instruction would have been inappropriate if aiding and abetting was the prosecution's exclusive theory of liability, it was not error to include the instruction in light of the evidence and the theories in this case.

H. Cumulative Effect

Alvarez argues that if any of the "numerous constitutional errors" were not prejudicial in isolation, the cumulative effect of the errors requires reversal. We disagree. To the extent any errors occurred, they are harmless individually and cumulatively.

I. Cruel and Unusual Punishment

The court sentenced Alvarez to two consecutive terms of 25 years to life plus one year for the weapon enhancement, with the possibility of parole. Alvarez contends that her sentence is the functional equivalent of LWOP, and the court erred by sentencing her without considering the factors identified in *Miller v. Alabama* (2012) 567 U.S. __ [132 S.Ct. 2455, 183 L.Ed. 407] (*Miller*). In *Miller*, the United States Supreme Court held that the Eighth Amendment prohibits the imposition of a mandatory LWOP sentence for a juvenile who commits murder. (*Id.* at p. 2469.)

A court may, however, impose an LWOP sentence for a juvenile who commits murder when the sentence is discretionary and the court "take[s] into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." (*Ibid.*, fn. omitted.) The Court identified five relevant factors: (1) the juvenile offender's "chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences"; (2) "the family and home environment that surrounds [the juvenile]—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional"; (3) "the circumstances of the homicide offense, including the extent of [the juvenile's] participation in the conduct and the way familial and peer pressures may have affected him," including whether substance abuse influenced the juvenile's criminal conduct; (4) whether the juvenile "might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys"; and (5) whether there is a possibility of rehabilitation, for which the absence or existence of a criminal history is relevant. (*Id.* at pp. 2468–2469.) *Miller* does not address whether the rules it announced applied to lengthy sentences that are functionally equivalent to LWOP.

In response to *Miller* and other decisions of the United States and California Supreme Courts, the California Legislature enacted Senate Bill No. 260 (2013–2014 Reg. Sess.), adding section 3051 and section 4801, subdivision (c). Section 3051 provides in pertinent part that (subject to exceptions that are not applicable here) "[a] person who was convicted of a controlling offense that was committed before the person had attained 23 years of age and for which the sentence is a life term of 25 years to life shall be eligible for release on parole by [the Board] during his or her

25th year of incarceration at a youth offender parole hearing." [9] (§ 3051, subds. (b)(3) & (h).) The youth offender parole hearing "shall provide for a meaningful opportunity to obtain release." (*Id.*, subd. (e).) In assessing the inmate's "growth and increased maturity," the Board shall "take into consideration" and "give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law." (*Id.*, subd. (f)(1); § 4801, subd. (c).)

In *Franklin*, *supra*, 63 Cal.4th 261, a juvenile convicted of murder and sentenced to a mandatory term of 50 years to life asserted that his sentence was the functional equivalent of LWOP and unconstitutional under *Miller*. Our Supreme Court granted review to determine whether section 3051 mooted his constitutional challenge and, if not, whether his sentence violated *Miller*'s prohibition against mandatory LWOP sentences for juveniles. (*Franklin*, *supra*, 63 Cal.4th at p. 268.) Although the Court stated that "a juvenile may not be sentenced to the functional equivalent of LWOP for a homicide offense without the protections outlined in *Miller,*" it held that section 3051 did moot the defendant's constitutional argument. (*Id.* at pp. 268, 276-277.) Section 3051, the Court explained, "effectively reforms the parole eligibility date of a juvenile offender's original sentence so that the longest possible term of incarceration before parole eligibility is 25 years." (*Id.* at p. 281.) The statute "thus superseded the statutorily mandated sentences of inmates who . . . committed their controlling

---

[9] A "[c]ontrolling offense" is defined as "the offense or enhancement for which any sentencing court imposed the longest term of imprisonment." (§ 3051, subd. (a)(2)(B).)

offense before the age of 18."[10] (*Id.* at p. 278.) Because such inmates are, "by operation of law, . . . entitled to a parole hearing and possible release after 25 years of incarceration," they are "not serving an LWOP sentence or its functional equivalent." (*Id.* at pp. 281-282.)

Alvarez contends that *Franklin*'s mootness holding does not apply here because Alvarez's functional LWOP sentence was the result of the trial court's exercise of judicial discretion, whereas in *Franklin* the defendant's functional LWOP sentence of 50 years to life was mandatory.[11] We disagree. Nothing in section 3051 or *Franklin* suggests that the statute would affect discretionary sentences any differently than mandatory sentences. Regardless of whether a juvenile's lengthy sentence was the result of judicial

---

[10] Section 3051 originally applied to persons who committed a controlling offense before the person was 18 years old. (Former § 3051; Stats. 2013, ch. 312, § 4.) The Legislature amended the statute in 2015 to include persons under 23 years of age. (Stats. 2015, ch. 471, § 1.)

[11] Alvarez's 51 years to life sentence is the sum of two 25-years-to-life sentences for two counts of murder (§§ 190, 190.5; *People v. Spears*, *supra*, 33 Cal.3d at p. 283) plus a one-year sentence for her personal use of a deadly or dangerous weapon (§ 12022, subd. (b)(1)). Whether to run the sentences for the murder convictions consecutively or concurrently was a matter of discretion for the trial court. (§ 669; *People v. Leon* (2016) 243 Cal.App.4th 1003, 1025.) The sentence in *Franklin*, by contrast, was the sum of a 25-years-to life sentence for one murder plus a 25-years-to-life enhancement for personally discharging a firearm and causing death in the commission of the crime. (§ 12022.53, subd. (d).) Unlike the sentence for a second murder, the enhancement "shall" run consecutive to the sentence for the murder. (*Ibid.*)

discretion or legislative mandate, the inmate will be entitled to a youth offender parole hearing in his or her 25th year of incarceration and, therefore, will not serve LWOP or its functional equivalent and "no *Miller* claim arises." (*Franklin*, *supra*, 63 Cal.4th at p. 280; see *People v. Cornejo* (2016) 3 Cal.App.5th 36, 68 [*Franklin* applies to sentence, "a portion of which was mandatory and the remainder discretionary"].)

Alvarez further argues that *Franklin* addressed the issue of cruel and unusual punishment under the Eighth Amendment to the United States Constitution, but not California's constitutional prohibition against cruel or unusual punishment. (See Cal. Const., art. I, § 17.) Although Alvarez is correct that courts have construed our state constitutional provision separately from the Eighth Amendment (see *People v. Carmony* (2005) 127 Cal.App.4th 1066, 1085), she offers no persuasive argument for limiting *Franklin*'s analysis to the federal constitution.[12] Indeed, because the Legislature has, in effect, "reform[ed]" Alvarez's sentence to provide her with a parole eligibility in her 25th year of incarceration (*Franklin*, *supra*, 63 Cal.4th at p. 281), her sentence for two murders is not "grossly disproportionate" to her offenses. (*People v. Dillon* (1983) 34 Cal.3d 441, 478.) It does not, therefore, violate the California Constitution.

---

[12] Alvarez also contends that "*Franklin* was wrongly decided," (boldface omitted) and that the "after-the-fact corrective by the legislature should not render moot a claim that the sentencing court failed to impose sentence in a constitutional manner." Alvarez acknowledges, however, that we might consider ourselves "bound to follow *Franklin* on this point," but that she "nevertheless raises this issue here to preserve the issue for review" in the state Supreme Court and federal courts. We are, of course, so bound. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Although *Franklin* resolves issues concerning the constitutionality of Alvarez's sentence, *Franklin* raises another question—whether the trial court should hold a so-called "baseline hearing" (*Franklin*, *supra*, 63 Cal.4th at p. 287 (conc. & dis. opn. of Werdegar, J.)) to permit Alvarez to make a record of evidence relevant to a youth offender parole hearing. In *Franklin*, the Court explained that sections 3051 and 4801 "contemplate that information regarding the juvenile offender's characteristics and circumstances at the time of the offense will be available at a youth offender parole hearing to facilitate the Board's consideration. For example, section 3051, subdivision (f)(2) provides that '[f]amily members, friends, school personnel, faith leaders, and representatives from community-based organizations with knowledge about the individual before the crime . . . may submit statements for review by the [B]oard.' " (*Franklin*, *supra*, 63 Cal.4th at p. 283.) Assembling that information, the Court observed, "is typically a task more easily done at or near the time of the juvenile's offense rather than decades later when memories have faded, records may have been lost or destroyed, or family or community members may have relocated or passed away." (*Id.* at pp. 283-284.)

The *Franklin* Court stated it could not determine whether the defendant had a sufficient opportunity to put such information on the record. (*Franklin*, *supra*, 63 Cal.4th at p. 284) The Court then remanded the matter for the limited purpose of determining "whether [the defendant] was afforded sufficient opportunity to make a record of information relevant to his eventual youth offender parole hearing." (*Id.* at p. 284.) If the trial court determines that the defendant "did not have sufficient opportunity, then the court may receive submissions and, if appropriate, testimony pursuant to procedures set forth in section 1204 and rule 4.437 of the California Rules of Court, and subject to the

rules of evidence. [The defendant] may place on the record any documents, evaluations, or testimony (subject to cross-examination) that may be relevant at his eventual youth offender parole hearing, and the prosecution likewise may put on the record any evidence that demonstrates the juvenile offender's culpability or cognitive maturity, or otherwise bears on the influence of youth-related factors." (*Franklin*, *supra*, 63 Cal.4th at p. 284.)

The Attorney General argues that remand is unnecessary because Alvarez had a sufficient opportunity to make, and did make, a record of information relevant to her eventual youth offender parole hearing. The Attorney General finds support in our prior opinion, in which we stated that the record indicates that the court considered the pertinent *Miller* factors in selecting the sentence. Nevertheless, the fact that the court considered the *Miller* factors does not necessarily mean that Alvarez had an opportunity to place on the record evidence that would be relevant at her youth offender parole hearing. As Alvarez observes, at the time of the sentencing hearing, *Franklin* had not been decided "and the defense had little, if any, relevant authority to guide their handling of the hearing with respect to the hearing's related purpose of establishing a record that could be used at [her] youth offender parole hearing." As in *Franklin*, we believe the appropriate course is to remand the matter for the purpose of determining whether Alvarez was afforded the opportunity the *Franklin* Court established and, if not, to hold the baseline hearing described in that case.

II. Alvarez's Habeas Petition

In Alvarez's habeas petition, she contends that her trial attorney was constitutionally and prejudicially deficient in four ways: (1) Counsel failed to move to suppress Alvarez's confession on the grounds that it was obtained in violation of her

constitutional rights under *Miranda*; (2) Counsel turned over to the prosecution an unredacted, privileged report from defense psychologist, Dr. Kaser-Boyd; (3) Counsel failed to object to the prosecutor's statements in closing argument that aiders and abettors are "equally guilty"; and (4) Counsel failed to object to the prosecutor's statements in closing argument that this case was "indefensible" and Alvarez's defense was a "fiction developed for you." We reject those contentions.

"Under both the Sixth Amendment to the United States Constitution and article I, section 15, of the California Constitution, a criminal defendant has the right to the assistance of counsel. [Citations.] The ultimate purpose of this right is to protect the defendant's fundamental right to a trial that is both fair in its conduct and reliable in its result. [Citations.]" (*People v. Ledesma* (1987) 43 Cal.3d 171, 215, citing *Strickland v. Washington* (1984) 466 U.S. 668, 684-687; *People v. Pope* (1979) 23 Cal.3d 412, 422-425.) To establish Alvarez's claim of ineffective assistance, she must show that her counsel's performance "fell below an objective standard of reasonableness" evaluated "under prevailing professional norms." (*Strickland v. Washington*, *supra*, 466 U.S. at p. 688; accord, *People v. Ledesma*, *supra*, 43 Cal.3d at p. 216.) If Alvarez establishes that counsel's performance was deficient, she is entitled to relief only if she also establishes that she was prejudiced by counsel's dereliction. (*Strickland v. Washington*, *supra*, at pp. 691–692; accord, *People v. Ledesma*, *supra*, at p. 217.) In order to show prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland v. Washington*, *supra*, at p. 694.) The defendant bears the burden of proof on these issues

by a preponderance of the evidence. (*People v. Ledesma*, *supra*, at p. 218.)

A. Failure to Move to Suppress Alvarez's Statements to Police

Alvarez contends that her trial counsel was constitutionally deficient because counsel failed to move to suppress evidence of her statements to the police on the ground that they were made in violation of her *Miranda* and due process rights. We disagree.

A waiver of *Miranda* rights must be knowing, intelligent, and voluntary under the totality of the circumstances of the interrogation. (*People v. Sauceda-Contreras* (2012) 55 Cal.4th 203, 217.) A waiver is voluntary when it is " 'the product of a free and deliberate choice rather than intimidation, coercion, or deception' [citation], and knowing in the sense that it was 'made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.' [Citation.]" (*Id.* at p. 219.) The prosecution bears the burden of proving these elements by a preponderance of the evidence. (*People v. Linton* (2013) 56 Cal.4th 1146, 1171.)

In a letter from Alvarez's trial counsel, Carole Telfer, to Alvarez's habeas counsel, Telfer states that she reviewed the transcripts and videotapes of Alvarez's confession several times and did not find any legal basis for suppressing the statements. For the reasons that follow, Telfer's decision not to file a motion to suppress the statements did not fall below the requisite standard of reasonableness and, if it did, Alvarez has failed to establish any resulting prejudice.

Had counsel so moved and had the trial court refused to suppress Alvarez's statements, we would have affirmed. Even if we assume that Alvarez was in custody for purposes of *Miranda* at the time of the interview, nothing in the record suggests that

her waiver of her right to remain silent was anything other than knowing, intelligent, and voluntary.

After Alvarez told the deputies the false story about her parents' disappearance and before the deputies confronted her with the notebook found at her house, the following colloquy took place:

"[Deputy] Bergner: Help us out, find your mom, and the best way we can, uh, you can help us out is being as truthful and truthful and honest as possible. So, you know that obviously, you don't have to sit here and talk to us, but you are because you wanna help us out [and] find mom, right?

"Alvarez: Yeah.

"[Deputy] Bergner: Okay. You read and write English, right?

"Alvarez: Yeah.

"[Deputy] Bergner: Okay. So what I want you to do is read through this real quick because we got a couple things we wanna show you, okay?

"Alvarez: Uh-huh

"[Deputy] Bergner: And we wanna confirm all the information and try to get all that stuff so we can get your mom tracked down, okay?

"Alvarez: Yeah.

"[Deputy] Bergner: Okay. You have the right to remain silent; do you understand that?

"Alvarez: Yes.

"[Deputy] Bergner: Okay. Now just put a circle mark next to the ones, or, circle next to the one if you understand. You understand, right?

"Alvarez: Yeah.

"[Deputy] Bergner: Okay. Anything you say may be used against you in court; do you understand that?

"Alvarez: Yes.

"[Deputy] Bergner: You have the right to an attorney during questioning; do you understand?

"Alvarez: No.

"[Deputy] Bergner: Okay, you have the right to have an attorney with you when we talk to you.

"Alvarez: Attorney what? Oh—

"[Deputy] Bernstein: A lawyer.

"[Deputy] Bergner: Yeah.

"[Deputy] Bernstein: [A lawyer.] Abogado.

"Alvarez: Yeah.

"[Deputy] Bergner: And if you cannot afford an attorney, a lawyer, one will be appointed to you before questioning; do you understand that?

"Alvarez: Yeah.

"[Deputy] Bergner: And do you wanna talk to us about finding your mom?

"Alvarez: Yeah.

"[Deputy] Bergner: Okay. And then right down here, just sign right there by that X. Okay. Okay, I'm just gonna sign this myself." (Capitalization omitted.)

In addition to the transcription of the interview, the appellate record includes the audio-video recording of the interview. As each admonition was read, Alvarez marked a form next to the admonition to indicate she understood it. Contrary to Alvarez's characterization that the deputy read the admonition "quickly," the pace of the interaction appears to be no quicker than ordinary conversation and consistent with the interview generally.

One aspect of this interaction is particularly relevant. When Deputy Bergner asked Alvarez if she understood that she has a right to an attorney during questioning, Alvarez initially responded, "No." When the deputy repeated the admonition, she looked back at him questioningly and asked, "Attorney what?" Deputy Bernstein

responded, "A lawyer. Abogado."[13] Alvarez then indicated she understood and marked the form. Rather than indicate a lack of understanding about her rights, this interaction reveals that Alvarez was listening carefully to the deputy's words and was willing to speak up and admit her lack of understanding when she did not understand.

Alvarez's initial lack of understanding regarding the right to have an attorney present during questioning does not indicate that she did not have the capacity to, or did not, understand the *Miranda* admonitions. Once the deputies explained that the word "attorney" meant lawyer, or abogado (lawyer in Spanish), she indicated her understanding and marked the form. Other than this initial lack of understanding regarding the English word for attorney, there is nothing in the interview to suggest that Alvarez had any difficulty with understanding spoken or written English.

We have reviewed the transcript and audio-video recording of the interview and there is nothing to suggest that Alvarez did not understand the rights explained to her or was unwilling to talk to the deputies. Based on the totality of the circumstances, Alvarez voluntarily, knowingly, and intelligently waived those rights. Alvarez has therefore failed to establish that her trial counsel was ineffective for failing to move to suppress Alvarez's statements to the deputies on that ground.

Alvarez further contends that her counsel was deficient by failing to move to suppress her confession on the ground it was involuntary. We disagree because nothing in the record would have supported such a motion.

---

[13] The transcription of the interview included in the clerk's transcript reports this line as "(Inaudible). Abogado." In the audio-video recording of the interview, however, the "[i]naudible" phrase is clearly, "A lawyer."

B. Turning Over Dr. Kaser-Boyd's Report to the Prosecution

Prior to trial, Dr. Kaser-Boyd, an appointed defense psychologist, interviewed Alvarez to evaluate her mental state at the time of the murders. Dr. Kaser-Boyd's report included incriminating statements that Alvarez had not made to the police. First, in describing the moments just before Villalta was killed, Alvarez said: " 'My mom went[,] "Oh, the food is ready," and went outside and then I told [Gallardo] to go. I moved my hand, like[,] "Go." Then it all happened.' " Second, in describing Lara's struggle with Gallardo, Alvarez said: " 'He (Lara) had the knife in his hand, and I kicked it away from him.' " Third, Alvarez said that Gallardo " 'told me to get a black knife from the kitchen table. I think when he was unconscious he was hitting him, and he stabbed him.' " As Alvarez correctly points out, she had not told the interviewing deputies about her hand gesture to Gallardo, that she had kicked a knife away from Lara, or that she had retrieved a knife for Gallardo.

Dr. Kaser-Boyd's report is dated March 31, 2013. In a letter to Alvarez's habeas counsel, Telfer stated that she received the report on the morning of April 2, 2013, the date set for the defense to make its discovery disclosures. (See § 1054.3.) Regarding the report, Telfer explained: "I did not have much time, if any, to actually absorb all of the information I had received on this case and 'ponder' or think about tactics as to what should be given and not given to the [district attorney]. Because it had been made clear by me, to the court and counsel, that I intended to put my client on the stand, and because I was hoping that [Dr.] Kaser-Boyd's report would lead the [district attorney] to possibly offer a negotiated settlement, I gave the report, as is, to the prosecutor. Also, I did not know at that time, that I would be forced to call my client to the stand before being allowed to bring in other evidence of her

abuse by the victims. [¶] With respect to any impact [Alvarez's] statements to Dr. Kaser-Boyd in the report made, I believe one of her statements made a big impact. When . . . Alvarez was being cross-examined by Deputy D.A. Trutanich, Ms. Trutanich asked her about giving a hand signal to the co-defendant that said it was okay to go ahead with the act of killing her mom, and Ms. Alvarez admitted that she did give him a hand signal, like 'go.' . . . Also, in the report she had told [Dr. Kaser-Boyd] that victim Lara had a knife in his hand, and she kicked it away from him. . . . Ms. Trutanich asked her about that as well in her cross-examination. It appeared to have made an impact on the jury, as I heard an audible gasp. Both of these statements seemed to make her out to be more of an active participant, than just present at the crime."

Alvarez and the Attorney General agree that Dr. Kaser-Boyd's report was, at least initially, protected from disclosure by the physician-patient privilege and the attorney-client privilege. (See Evid. Code, §§ 951-954, 1014, 1017; *People v. Ledesma* (2006) 39 Cal.4th 641, 690.) Although the physician-patient privilege would have been waived once Alvarez put her mental state in issue, the report could have remained protected from disclosure under the attorney-client privilege until Dr. Kaser-Boyd testified at trial, even after identifying Dr. Kaser-Boyd as a potential witness in the defense's disclosures. (§ 1054.6; *Rodriguez v. Superior Court* (1993) 14 Cal.App.4th 1260, 1269; *Andrade v. Superior Court* (1996) 46 Cal.App.4th 1609, 1614.)

The only reason Telfer gave for turning over the privileged report approximately three weeks before trial is that she "was hoping that [it] would lead the [district attorney] to possibly offer a negotiated settlement." Telfer admits, however, that she had not had time "to actually absorb all of the information [she] had received on this case" or to consider tactics in disclosing information

to the prosecution. The comment indicates that Telfer did not carefully read or fully understand the significance of Dr. Kaser-Boyd's report before producing it to the prosecution. Even if we assume that turning over Dr. Kaser-Boyd's report in order to evoke a settlement offer might be a valid tactical decision once counsel understood its contents, there appears to be no legitimate reason for doing so before then. The production of the privileged document without such an understanding, we conclude, fell below an objective standard of reasonableness. (See *People v. Ledesma*, *supra*, 43 Cal.3d at p. 215 [a defendant can "reasonably expect that before counsel undertakes to act at all he will make a rational and informed decision on strategy and tactics founded on adequate investigation and preparation"].)

Alvarez has not, however, established that the early production of the document was prejudicial. Because the defense called Dr. Kaser-Boyd to testify at trial, the defense would have been required to turn over the report eventually. (See *People v. Coleman* (1989) 48 Cal.3d 112, 152; *People v. Whitmore* (1967) 251 Cal.App.2d 359, 366.) There is no reason to believe that the prosecution's premature access to the report produced a different result at trial.

Alvarez argues that if counsel had not turned the report over to the prosecution when she did, she might have elected not to call Dr. Kaser-Boyd at all, and thereby avoided the disclosure of Alvarez's incriminating statements to the psychologist. Even if we assume that Alvarez's counsel would have made that tactical decision, Alvarez has not established a reasonable probability that the result of the trial would have been different. Excluding the admissions in Dr. Kaser-Boyd's report, the evidence of Alvarez's guilt is overwhelming, and Telfer, in her letter to habeas counsel, does not indicate she would have made such an election, implying that she would have called Dr. Kaser-Boyd regardless of the

inculpatory statements in the report. The reasonableness of that decision would depend upon whether the benefits of Dr. Kaser-Boyd's testimony outweighed the harm to the defense case as a result of the statements. The extent of the harm depends upon the strength of the evidence against Alvarez in the absence of the additional statements. That evidence includes the following. According to Alvarez, she and Gallardo had talked about killing her parents in the weeks before the murders and, as she stated in her police interview, agreed to "do it." On the day of the murders, she invited Gallardo into her house after Gallardo said he was there to kill her parents. Alvarez let Gallardo hide inside the house, out of Villalta's sight. In response to Gallardo's gestures indicating he was going to kill Villalta, Alvarez wrote notes to him, asking, for example, whether it might be better to kill Villalta after she went to bed. Although Alvarez indicated to Gallardo that *she* did not want to kill her mother because she was afraid she would have flashbacks, she told him, "You do it." Thus, even without the statement to Dr. Kaser-Boyd that Alvarez made the gesture to Gallardo "to go," the evidence that she aided and abetted Gallardo's murder of Villalta is compelling. The evidence of Alvarez's participation in the murder of Lara is also strong even in the absence of her statements to Dr. Kaser-Boyd. After seeing Villalta's dead body on the floor and knowing Gallardo's plan to kill Lara, Alvarez waited silently on her couch as Gallardo hid behind a door with a baseball bat. As Gallardo struggled with Lara, Alvarez came to his aid and hit Lara with the baseball bat. Thus, while some statements in Dr. Kaser-Boyd's report were harmful to the defense, in light of the strength of the case against her even without that report, Alvarez has failed to establish prejudice.

C. Failure to Object to the Prosecutor's "Equally Guilty" Comment

During closing argument, the prosecutor stated: "Aiding and abetting tells you that a person may be guilty of a crime in two ways: She directly commit[ted] the crime, or she aided and abetted someone else, the perpetrator, Giovanni Gallardo, . . . who committed the crime. A person is equally guilty, equally guilty of the crime whether she committed it personally or whether she aided and abetted the perpetrator who committed it." The prosecutor also referred to a PowerPoint-style slide with the statement: "A person is equally guilty of the crime whether she committed it personally or aided and abetted the perpetrator who committed it." (Underlining in original.)

Alvarez contends that her trial counsel was constitutionally deficient by failing to object to the prosecutor's "equally guilty" language as an incorrect statement of law. The statement is incorrect, she asserts, because aiders and abettors may be more or less culpable than the direct perpetrator, depending upon their respective mental states; they are not necessarily equally guilty. (See *People v. Nero* (2010) 181 Cal.App.4th 504, 518-519; *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1164-1165.)

Telfer explained in her letter to habeas counsel that she "pondered whether or not to object" to this comment, but decided to "let it go" because the "statement was generally 'correct.' "

Although a former version of CALCRIM No. 400 used the phrase "equally guilty," the jury was properly instructed with a version of CALCRIM No. 400 that omits that phrase and states that a "person is guilty of a crime whether he or she committed it personally or aided and abetted the perpetrator." (See *People v. Nero*, *supra*, 181 Cal.App.4th at p. 517 [former version of CALCRIM No. 400].) The jurors were further instructed that they "must follow the law as [the court] explain[s] it to you" and "[i]f you believe that

the attorneys' comments on the law conflict with [the court's] instructions, you must follow [the court's] instructions." We presume the jury followed these instructions. (*People v. Boyette* (2002) 29 Cal.4th 381, 436.) Therefore, even if we assume that the prosecutor's statement was legally incorrect and Telfer's failure to object to the prosecutor's statement fell below the requisite standard of care, Alvarez has failed to establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland v. Washington*, *supra*, 466 U.S. at p. 694.) We therefore reject Alvarez's argument.

Moreover, Telfer's decision not to object because the "equally guilty" statement is "generally correct" is also a valid tactical decision. In *People v. Samaniego*, *supra*, 172 Cal.App.4th 1148, which held that the "equally guilty" language in former CALCRIM No. 400 was misleading, the court acknowledged that it is nevertheless "*generally correct* in all but the most exceptional circumstances." (*Id.* at p. 1165, italics added; see also *People v. Smith* (2014) 60 Cal.4th 603, 613 [" 'those who aid and abet and those who actually perpetrate the offense are principals and equally culpable' "].) Such "exceptional circumstances" would exist when, for example, one defendant intends to aid and abet another in the commission of an assault and the direct perpetrator assaulted the victim then intentionally killed another. If the killing was not a natural and probable consequence of the assault, the aider and abettor would be less culpable than the direct perpetrator. (*People v. Woods* (1992) 8 Cal.App.4th 1570, 1593.) Here, however, there is no evidence that Alvarez, in aiding and abetting Gallardo, intended anything less than Villalta's and Lara's deaths. Thus, even if counsel objected to the prosecutor's statement and the court made an appropriate admonishment, it is not reasonably probable that the objection would have had any effect upon the jury or the result.

(See *People v. Johnson* (2016) 62 Cal.4th 600, 640-641.) Alvarez was not, therefore, deprived of the effective assistance of counsel on this basis.

D. Failure to Object to Other Statements in the Prosecutor's Closing Argument

In the prosecutor's rebuttal argument, she made the following statements: "When I was first assigned this case and I read the facts of it, I thought to myself, 'how do you defend a crime that is truly indefensible?' And we just listened to the defense summary in this case. And it's blame everyone else and paint a picture of a sad, submissive, abused girl." Later, the prosecutor showed the jury the video recording of Alvarez and Gallardo while they were alone together at the sheriff's station, and commented on Alvarez's behavior: "This is not a girl who is meek in the corner and sitting there scared of . . . Gallardo. That's not her personality. That was all fiction that was developed for you." Telfer did not object to these statements.[14]

Alvarez contends that these statements constitute prosecutorial misconduct and that Telfer was constitutionally ineffective for failing to object. We disagree. We have considered the challenged statements in their context and conclude that they do not constitute prosecutorial misconduct, and the failure to object,

---

[14] In Telfer's letter to habeas counsel, she stated that she did not hear the prosecutor make the challenged statement. Telfer explained, "I had a[n] emotional breakdown after my closing argument, and was not very focused on anything thereafter." She also refers to the declaration that she made in support of Alvarez's motion for new trial, in which she states, "When I was making my closing argument . . . , I started having trouble with labored breathing while arguing. After the trial, I broke down mentally and cried for a long time (outside [the] presence of the jury)."

therefore, did not fall below the standard of care for constitutionally effective counsel.

E. Cumulative Effect of Errors

Alvarez contends that even if the alleged errors of her counsel did not constitute ineffective assistance when viewed separately, the cumulative effect does. As discussed above, the only acts that were potentially below the applicable standard of care were the premature disclosure of Dr. Kaser-Boyd's report and the failure to object to counsel's reference to the equal guilt of aiders and abettors. Whether such conduct is considered individually or cumulatively, Alvarez has failed to establish that they were prejudicial.

For all the foregoing reasons, we deny Alvarez's petition for a writ of habeas corpus.

III. Gallardo's Appeal

A. Gallardo's Waiver of Miranda Rights

Prior to trial, Gallardo moved to exclude the statements he made in his police interview on the ground that he did not validly waive his *Miranda* rights. Following an evidentiary hearing, the court concluded that Gallardo was not in custody during the police interview and, if he was, he made a knowing and intelligent waiver of his rights. Gallardo contends that the ruling was erroneous for two reasons. First, Gallardo was in custody when he was interrogated; and second, his waiver of his *Miranda* rights was neither knowing nor intelligent. We reject the second contention and, therefore, do not address the first.

The standards pertaining to our review of alleged *Miranda* violations are set forth in our discussion of Alvarez's habeas petition above. In short, the waiver must be knowing, intelligent, and voluntary under the totality of the circumstances of the interrogation. (*People v. Sauceda-Contreras*, *supra*, 55 Cal.4th

at p. 217.) We " 'must accept the trial court's resolution of disputed facts and inferences, as well as its evaluation of the credibility of witnesses where supported by substantial evidence. [Citations.]' " (*Ibid.*) We then independently determine from the undisputed facts and those found by the trial court whether the challenged statement was lawfully obtained. (*People v. Johnson* (1993) 6 Cal.4th 1, 25.)

Gallardo's police interview lasted about an hour and 45 minutes. Near the outset of the interview, the following colloquy took place:

"[Deputy] Bergner: Okay. You read and write English, right?

"Gallardo: No, I can't write and I can't read.

"[Deputy] Bergner: You can't read?

"Gallardo: No.

"[Deputy] Bergner: Okay. Can you—so you don't read English at all?

"Gallardo: Huh-uh.

"[Deputy] Bergner: Okay, well let me explain this to you then.

"[Deputy] Bernstein: Yeah, but you speak, as your primary language, in English, correct?

"Gallardo: In English, yeah. I can speak it right, but I can't write or read it.

"[Deputy] Bernstein: Okay. But you['re] comfortable with us speaking to you in English?

"Gallardo: Uh-huh. Yeah.

"[Deputy] Bernstein: Okay.

"[Deputy] Bergner: Okay, well I'm gonna explain this to you then, and if at any time you don't understand me, you can tell me, okay? You have the right to remain silent. You don't have to talk to us; do you understand?

"Gallardo: Uh-huh.

"[Deputy] Bergner: Is it yes?

"Gallardo: Yes.

"[Deputy] Bergner: Okay. Anything you say may be used against you in court; do you understand?

"Gallardo: Uh-huh. Yes.

"[Deputy] Bergner: You have the right to an attorney during questioning; do you understand?

"Gallardo: Uh-huh. Yes.

"[Deputy] Bergner: If you can't afford an attorney, one will be appointed for you before questioning; do you understand?

"Gallardo: Yes, I do.

"[Deputy] Bergner: Do you wanna talk to us about what happened?

"Gallardo: Yes.

"[Deputy] Bergner: Okay. We're gonna set everything straight?

"Gallardo: Uh-huh.

"[Deputy] Bergner: Okay. You understand everything I just told you?

"Gallardo: Yes.

"[Deputy] Bergner: Are you confused at any points?

"Gallardo: No, I'm not confused.

"[Deputy] Bergner: And what I just read to you were these one, two, three, four, five pieces, okay? And as I read them to you, you indicated that you understood each one of them, correct?

"Gallardo: Yes.

"[Deputy] Bergner: Okay. If you can, can you sign right here?

"[Deputy] Bernstein: You're in tenth grade, so you—you can write a little bit. You didn't get to tenth grade without writing and reading.

"Gallardo: Well, I'm in special classes pretty much.

"[Deputy] Bernstein: Okay.

"Gallardo: And they . . . understand how I am.

"[Deputy] Bergner: Oh, I understand that. I'm just saying you know how to read and write a little bit.

"Gallardo: (Inaudible).

"[Deputy] Bergner: Do you speak Spanish?

"Gallardo: Yeah.

"[Deputy] Bergner: Yeah? What do you speak at home mostly? Spanish or English?

"Gallardo: Spanish.

"[Deputy] Bergner: Spanish? But, again, there's no questions? You understood everything that I explained to you?

"Gallardo: Yeah, everything's okay. Yeah. I understand everything." (Capitalization omitted.)

At the hearing on Gallardo's motion, Deputy Bergner testified that Gallardo's mother brought Gallardo to the Compton sheriff's station without being asked to do so. Bergner and another deputy escorted Gallardo to a conference room and, later, after they interviewed Alvarez, to an interview room. Deputies Bergner and Bernstein were in the interview room with Gallardo. The deputies did not take out their firearms and there were no restraints placed on Gallardo. The deputies spoke English, and Gallardo seemed to understand. Gallardo never indicated that he would have been more comfortable speaking in another language. About four and a half minutes into the interview, Deputy Bergner advised Gallardo of his *Miranda* rights, in English. Gallardo assented to each advisement and "circl[ed] each line as

[the deputy] read them to him. At no point did Gallardo ask to leave the room or request an attorney.

The court ruled that Gallardo was not in custody for purposes of *Miranda*, and, if he was, he knowingly and intelligently waived his *Miranda* rights. The court expressly considered Gallardo's young age, the evidence that he had an I.Q. score of 57, and that he was not able to read or write English. Gallardo, the court stated, did not have an "extreme impediment that would prevent him from understanding."

On appeal, Gallardo concedes that his waiver of rights was voluntary; he contends, however, that it was not made knowingly and intelligently. Gallardo points to the following factors: (1) his understanding of English was limited; (2) his lack of familiarity with the *Miranda* advisements (there was no evidence he had previously been arrested or advised of his *Miranda* rights); (3) his young age (16 years); and (4) his low I.Q. (57). We disagree.

The record supports the trial court's determination. Although Gallardo stated that he did not read or write English fluently, he showed no difficulty in understanding the language and nothing in his responses suggested that he did not understand his rights as Deputy Bergner read them. Although, as the trial court recognized, Gallardo's youth and low I.Q. are relevant factors in considering whether the waiver was knowing and voluntary (see, e.g., *In re John S.* (1988) 199 Cal.App.3d 441, 445), neither Gallardo's age nor his low I.Q. score preclude a valid waiver. (See *In re Norman H.* (1976) 64 Cal.App.3d 997, 1002-1003 [15-year-old with an I.Q. of 47 could validly waive *Miranda* rights].) Finally, Gallardo's alleged lack of familiarity with *Miranda* does not render his waiver, under the totality of the circumstance, invalid.

B. Failure to Give Accomplice Instruction

During Gallardo's police interview, Deputy Bergner informed Gallardo that Alvarez had been "honest" and "pretty truthful" with them and, as a result, they "got the real story" and knew "exactly what happened." Although the deputies did not quote Alvarez verbatim, Gallardo contends that "the gist of what Alvarez told the detectives was clear—she implicated both herself and Gallardo in the murders." Gallardo contends that because this colloquy implied that Alvarez, an undisputed accomplice, had implicated Gallardo, the court had a sua sponte duty to instruct the jury that Alvarez was an accomplice whose out-of-court statements must be viewed with caution and corroborated.[15]

Under section 1111, a "conviction can not be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense." The "testimony" of an accomplice for purposes of section 1111 includes out-of-court statements " 'made under suspect circumstances,' " such as " 'when the accomplice has been arrested or *is questioned by the police*.' " (*People v. Williams* (1997) 16 Cal.4th 153, 245, quoting *People v. Jeffery* (1995) 37 Cal.App.4th 209, 218, italics added.) The Attorney General does

---

[15] Specifically, Gallardo argues that the court should have given CALCRIM No. 335, which provides in part: "You may not convict the defendant of <*insert crime[s]*> based on the (statement/[or] testimony) of an accomplice alone. You may use the (statement/[or] testimony) of an accomplice to convict the defendant only if: [¶] 1. The accomplice's (statement/[or] testimony) is supported by other evidence that you believe; [¶] 2. That supporting evidence is independent of the accomplice's (statement/[or] testimony); [¶] AND [¶] 3. That supporting evidence tends to connect the defendant to the commission of the crime[s]."

not dispute that Deputy Bergner's statements about Alvarez's "testimony" implicate the need for corroborating evidence under section 1111.

A trial court's failure to instruct on accomplice liability is harmless if there is sufficient corroborating evidence in the record. (*People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 303.) The corroborating evidence may be slight and is ' "sufficient if it tends to connect the defendant with the crime in such a way as to satisfy the jury that the accomplice is telling the truth.' [Citation.]" (*Ibid.*) Here, the corroborating evidence of Gallardo's guilt is overwhelming. Gallardo gave a detailed confession of the murders, and guided deputies to locations where the bodies were buried and other physical evidence was found. His confession was itself corroborated by, among other things, his accurately locating the blanket Lara was wrapped in, another blanket used to dispose of Villalta's body, and the blood-stained baseball bat used to bludgeon Lara. Any error in failing to give an accomplice instruction was therefore harmless.

C. Gallardo's Sentence Is Not Cruel or Unusual Punishment

The trial court sentenced Gallardo to two terms of life without the possibility of parole pursuant to section 190.5, subdivision (b).[16]

---

[16] Section 190.5, subdivision (b) provides: "The penalty for a defendant found guilty of murder in the first degree, in any case in which one or more special circumstances enumerated in Section 190.2 or 190.25 has been found to be true under Section 190.4, who was 16 years of age or older and under the age of 18 years at the time of the commission of the crime, shall be confinement in the state prison for life without the possibility of parole or, at the discretion of the court, 25 years to life."

He contends that the trial court failed to consider the factors set forth in *Miller*, *supra*, 132 S.Ct. at p. 2455, discussed *ante*, and, therefore, his sentence violates the federal and state constitutional prohibitions against cruel and unusual punishment. We disagree.

In sentencing Gallardo, the court acknowledged its discretion under section 190.5, and stated that it had considered and weighed the *Miller* standards. In particular, the court noted Gallardo's age (16 years old at the time of the crimes), his mental and developmental disabilities, and the absence of any prior criminal or juvenile delinquency record. The court stated that it had read Gallardo's sentencing memorandum, which identified the *Miller* factors and emphasized Gallardo's developmental disabilities. The court also considered "the circumstances of the homicide offense" (*Miller*, *supra*, 132 S.Ct. at p. 2468, noting, in particular, that "the crime involved great violence with a high degree of cruelty[,] viciousness, and callousness," that Gallardo was armed and used a weapon, that the victims were "particularly vulnerable" and "unsuspecting in their home," and that the "manner in which the crime was committed showed planning and criminal sophistication."

The record demonstrates that the court considered the *Miller* factors and acted within its discretion in pronouncing an LWOP sentence.[17]

---

[17] Gallardo's abstract of judgment indicates that the court imposed a $300 parole revocation fine pursuant to section 1202.45. He contends that the fine is unauthorized because it may be imposed only when the sentence includes a period of parole. (See § 1202.45; *People v. Oganesyan* (1999) 70 Cal.App.4th 1178, 1183.) The Attorney General does not dispute the point, and we agree. We strike the fine.

As we noted at the outset, our Supreme Court has directed us to reconsider Gallardo's appeal in light of *Gutierrez*, *supra*, 58 Cal.4th 1354. In *Gutierrez*, the Supreme Court construed section 190.5, subdivision (b), as "confer[ring] discretion on the sentencing court to impose either life without parole or a term of 25-years-to-life on a 16- or 17-year-old juvenile convicted of special circumstance murder, *with no presumption in favor of life without parole*." (*Gutierrez*, *supra*, 58 Cal.4th at p. 1387, italics added.) In doing so, the Court expressly disapproved of the "prevailing authority" that had construed section 190.5, subdivision (b), as establishing a presumption in favor of LWOP. (*Gutierrez*, *supra*, 58 Cal.4th at pp. 1387, 1390 [disapproving of *People v. Guinn* (1994) 28 Cal.App.4th 1130].) Because the trial courts in the two cases under review in *Gutierrez* "dutifully applied the law as it stood at the time," and the record did not clearly indicate that the trial courts would have reached the same conclusion "had they been aware of the full scope of their discretion," the Court remanded the cases for resentencing. (*Gutierrez*, *supra*, at pp. 1390-1391.)

The trial court in this case addressed the issue whether section 190.5, subdivision (b) included a presumption of LWOP, and stated that "the court has some discretion in the sentence, and . . . that the presumption is that the sentence should be life without the possibility of parole." Under *Gutierrez*, this statement is error and, if the court had stopped there, resentencing would be required. The court, however, explained further: "Even if there is no presumption though, the court does not find any just cause or reason for the court to deviate from the sentence that the court will impose. The court considered the mitigating factors versus the aggravating factors, as well as any factors encouraged by [Gallardo's counsel]," as well as the factors "in the *Miller* case." "[E]ven after weighing such factors," the court concluded, Gallardo "still warrants . . . the sentence of life with a minimum parole eligibility of 25 years"

on each count. In light of these statements, the record " 'clearly indicate[d]' that the trial court would have reached the same conclusion" even if the court did not interpret the statute as establishing a presumption of LWOP. (*Gutierrez*, *supra*, 58 Cal.4th at p. 1391.) Therefore, resentencing is not required.

IV. Gallardo's Habeas Petition

Gallardo contends that he was deprived of the effective assistance of counsel because his attorney failed to request that the jury be instructed that it could consider his mental impairment in determining whether he had the specific intent to kill. (See CALCRIM No. 3428.) The standards concerning ineffective assistance are set forth above in our discussion of Alvarez's habeas petition and we incorporate them here.

CALCRIM No. 3428 provides in part: "You have heard evidence that the defendant may have suffered from a mental [disease, defect, or disorder]. You may consider this evidence only for the limited purpose of deciding whether, at the time of the charged crime, the defendant acted [or failed to act] with the intent or mental state required for that crime."

Scott Johnson represented Gallardo at trial. In a declaration supporting Gallardo's habeas petition, Johnson stated that he considered requesting the instruction, but "for tactical reasons based on the state of the evidence [he] concentrated [his] arguments on the false confession/accessory after the fact and chose not to ask for that instruction."

Gallardo's habeas petition fails for two reasons. First, even if Johnson requested the instruction, the evidence was insufficient to support the instruction. Substantial evidence in this context is "evidence sufficient to 'deserve consideration by the jury,' not 'whenever *any* evidence is presented, no matter how weak.' " (*People v. Williams* (1992) 4 Cal.4th 354, 361.) Here,

Gallardo did not present any substantial evidence that he had a mental disease, defect, or disorder. Dr. Miora testified that Gallardo had an I.Q. score of 57, which placed him "in the extremely low range of intellectual ability consistent with those who have mild to moderate mental retardation." Dr. Miora stated, however, that "other criteria . . . would need to be met before a formal diagnosis [of mental retardation] would be made." On other tests, Gallardo performed well or scored in the average range. Gallardo has not cited to any authority indicating that a low I.Q. score or intellectual disability, without more, constitutes a mental disease, defect, or disorder. He argues that *People v. Larsen* (2012) 205 Cal.App.4th 810 is comparable. In *Larsen*, there was expert testimony that the defendant had Asperger's Syndrome, which the court described as "a recognized mental diagnosis that warrants a mental disorder instruction." (*Id.* at p. 825.) Here, by contrast, Dr. Miora made no diagnosis of any mental disorder. The strongest opinion she could make is that his extremely low I.Q. was *consistent with* mild or moderate mental retardation; she did not opine that Gallardo had a mental disease, defect, or disorder. The evidence, therefore, was insufficient to support giving CALCRIM No. 3428.

Second, even if the evidence was sufficient to support the instruction, Gallardo's trial counsel's decision not to request the instruction was a reasonable tactical decision. Gallardo's primary defense was that Alvarez committed the murders and Gallardo falsely confessed to protect Alvarez. Gallardo, his counsel argued, merely "help[ed] clean up the mess after [Alvarez] and/or someone else killed her parents." CALCRIM No. 3428 is used in connection with a defense that the accused did not have the requisite mental state when he or she committed the actus reus of the crime. It is not relevant to a defense that someone else committed the crime. Gallardo's trial counsel could have reasonably determined that relying on CALCRIM No. 3428 as an alternative to his false

confession defense would reflect negatively on Gallardo and his credibility. The tactical decision to focus on the false confession defense and forego the mental state defense, therefore, does not constitute ineffective assistance.

V. Applicability of Proposition 57

On November 8, 2016, after Alvarez and Gallardo were sentenced and while this appeal was pending, California voters passed the Public Safety and Rehabilitation Act of 2016 (Proposition 57). The law became effective the next day. (See Cal. Const., art. II, § 10, subd. (a).) Proposition 57 eliminated the prosecutor's authority to file criminal charges against a minor directly in adult court. (*People v. Cervantes* (2017) 9 Cal.App.5th 569, 596 (*Cervantes*), review granted May 17, 2017, S241323.) Instead, a prosecutor must now file a petition in the juvenile court to have the court declare the minor a ward of the court. (Welf. & Inst. Code, §§ 602, 650, subd. (c).)[18] The prosecutor may then file a motion in the juvenile court to transfer the minor to adult court. (Welf. & Inst. Code, § 707, subd. (a)(1).)

In deciding a motion to transfer, the juvenile court shall consider the following factors: (1) "The degree of criminal sophistication exhibited by the minor"; (2) "Whether the minor can be rehabilitated prior to the expiration of the juvenile court's jurisdiction"; (3) "The minor's previous delinquent

---

[18] Welfare and Institutions Code section 602 currently provides: "Except as provided in Section 707, any person who is under 18 years of age when he or she violates any law of this state or of the United States or any ordinance of any city or county of this state defining crime other than an ordinance establishing a curfew based solely on age, is within the jurisdiction of the juvenile court, which may adjudge such person to be a ward of the court."

history"; (4) "Success of previous attempts by the juvenile court to rehabilitate the minor"; and (5) "The circumstances and gravity of the offense alleged in the petition to have been committed by the minor." (Welf. & Inst. Code, § 707, subds. (a)(2)(A)-(a)(2)(E).)

If the juvenile court does not transfer the case to adult court and thereafter adjudicates the petition in the juvenile court, the court may declare the minor a ward of the court based on a finding that the minor committed the alleged offenses. (Welf. & Inst. Code, §§ 602, 725, subd. (b).) In that event, the court does not impose the punishment applicable to adults who violated the same statute; instead, it makes a dispositional order intended to treat and rehabilitate the minor. (See Welf. & Inst. Code, §§ 725, 727, 730, 731, 1700; *People v. Smith* (2003) 110 Cal.App.4th 1072, 1080.) In determining an appropriate dispositional order, the court must consider, among other relevant material, the age of the minor, the circumstances and gravity of the minor's offense, and the minor's previous delinquent history. (Welf. & Inst. Code, § 725.5.) When the minor's offense is among certain enumerated crimes, including murder, the dispositional order may include physical confinement in a facility operated by the Division of Juvenile Facilities, Department of Corrections and Rehabilitation. (Welf. & Inst. Code, §§ 707, subd. (b)(1), 731, subd. (a)(4).) Ordinarily, the minor may not be confined beyond the age of 23 years. (Welf. & Inst. Code, §§ 607, subd. (f), 1769, subd. (c), 1771, subd. (b).)[19]

---

[19] If certain procedural and substantive requirements are met, the juvenile court may extend the minor's commitment every two years "as often as . . . necessary for the protection of the public." (Welf. & Inst. Code, § 1802; see *Cervantes*, *supra*, 9 Cal.App.5th at p. 611.)

According to its terms, Proposition 57 "shall be liberally construed to effectuate its purposes." (Voter Information Guide, Gen. Elec. (Nov. 8, 2016) text of Prop. 57, Public Safety and Rehabilitation Act of 2016, § 9, p. 146; see also *id*., § 5, p. 145 ["This act shall be broadly construed to accomplish its purposes."].) Among the express purposes of Proposition 57 is to "[s]top the revolving door of crime by emphasizing rehabilitation, especially for juveniles." (Voter Information Guide, Gen. Elec. (Nov. 8, 2016) text of Prop. 57, Public Safety and Rehabilitation Act of 2016, § 2, p. 141.) The act's emphasis on rehabilitation, one court has stated, is "a dramatic change of course and a ringing endorsement of rehabilitation as opposed to pure punishment, especially for youthful offenders." (*Cervantes*, *supra*, 9 Cal.App.5th at p. 605.) Another court has described Proposition 57 as part of "a sea change in penology regarding the relative culpability and rehabilitation possibilities for juvenile offenders." (*People v. Vela* (2017) 11 Cal.App.5th 68, 75 (*Vela*), review granted July 12, 2017, S242298.)

Alvarez and Gallardo contend that Proposition 57 should be applied retroactively to them because their judgments are not yet final.[20] Although their trials and pronouncements of sentences in

---

[20] The question whether Proposition 57 should apply retroactively has produced a split among the Courts of Appeal and is pending in our Supreme Court. (See *Cervantes*, *supra*, 9 Cal.App.5th 569, review granted May 17, 2017, S241323; *People v. Superior Court (Lara)* (2017) 9 Cal.App.5th 753, review granted May 17, 2017, S241231; *People v. Mendoza* (2017) 10 Cal.App.5th 327, review granted July 12, 2017, S241647; *Vela*, *supra*, 11 Cal.App.5th 68, review granted July 12, 2017, S242298; *People v. Marquez* (2017) 11 Cal.App.5th 816, petn. for rev. pending, petn. filed June 19, 2017, S242660;

adult court have already taken place, Alvarez and Gallardo assert that the judgments can be conditionally reversed and the cases remanded to the juvenile court for a transfer hearing. If the juvenile court orders their case transferred to adult court, they contend, the judgment would be reinstated; if the juvenile court decides they should remain in juvenile court, the juvenile court would then "select the appropriate juvenile court disposition." In light of the differences between the treatment of minors in adult court and juvenile court, as discussed above, the transfer hearing could have a significant impact on the nature and length of their incarceration. (See *People v. Smith*, *supra*, 110 Cal.App.4th at p. 1080 [listing the "immense" "practical consequences" of proceeding in criminal court].) Instead of imprisonment for, potentially, the rest of their lives, Alvarez and Gallardo could be discharged from a juvenile facility when they reach 23 years of age or earlier. (See *Vela*, *supra*, 11 Cal.App.5th at p. 77.)

"It is well settled that a new statute is presumed to operate prospectively absent an express declaration of retrospectivity or a clear indication that the electorate, or the Legislature, intended otherwise." (*Tapia v. Superior Court* (1991) 53 Cal.3d 282, 287 (*Tapia*).) Alvarez and Gallardo acknowledge this presumption and the fact that Proposition 57 "does not expressly state whether it applies retroactively to pending cases." They contend, however, that an exception to the presumption of prospectivity, established in *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*), applies here. We agree.

In *Estrada*, the Legislature reduced the punishment for a particular crime after the defendant committed the crime but before

---

and *People v. Superior Court (Walker*) (2017) 12 Cal.App.5th 687, petn. for rev. pending, petn. filed July 11, 2017, S243072.)

he was sentenced. (*Estrada*, *supra*, 63 Cal.2d at pp. 743-744.) Although the amending act was silent as to whether the reduced punishment applied to those who had been convicted of the crime prior to the amendment, the *Estrada* Court held that when a statute that is silent as to its retroactivity reduces the penalty for a "particular crime," "the new lighter penalty" will apply "to acts committed before its passage[,] provided the judgment convicting the defendant of the act is not final." (*Id.* at p. 745.) The Court explained that when the Legislature reduced a crime's punishment, it "obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act." (*Ibid.*) Given this determination, the Court continued, the Legislature must have intended that the lesser penalty applies retroactively "because to hold otherwise would be to conclude that the Legislature was motivated by a desire for vengeance, a conclusion not permitted in view of modern theories of penology." (*Ibid.*)

In *People v. Francis* (1969) 71 Cal.2d 66, the Supreme Court extended *Estrada*'s retroactivity rule to a statutory amendment that did not necessarily reduce the penalty in any particular case, but rather provided the trial court with discretion to impose a lesser sentence. (*Id.* at pp. 75-78; see also *People v. White* (1969) 71 Cal.2d 80, 83-84 [same].) Thus, the fact that the application of Proposition 57 in the instant case might—but will not necessarily—result in lesser punishment, does not preclude application of the *Estrada* rule. (See *Vela*, *supra*, 11 Cal.App.5th at p. 79 ["When a change in the law allows a court to exercise its sentencing discretion more favorably for a particular defendant, the reasoning of *Estrada* applies."].)

The *Francis* Court also rejected the argument that *Estrada* should not apply when retroactivity would require further proceedings and the "consequent disruption of the trial courts."

(*People v. Francis*, *supra*, 71 Cal.2d at p. 77.) The fact that further, post-remand proceedings would need to take place so that the trial court could exercise its discretion, the *Francis* Court explained, would not "impose an insurmountable burden on trial courts" and was not an impediment to applying the *Estrada* rule. (*Ibid.*) Similarly, the fact that retroactive application of Proposition 57 would require a post-remand transfer hearing does not preclude the law's retroactive application.

People v. Benefield (1977) 67 Cal.App.3d 51 (*Benefield*) is instructive. In that case, a juvenile defendant had been convicted in adult court of certain crimes and sentenced to prison. (*Id.* at p. 55.) Before his judgment was final, the Legislature enacted and amended a statute that required, with some exceptions, that a minor convicted of a crime in adult court not be directly sentenced to prison. The court could sentence the minor only after the former California Youth Authority (CYA) evaluated the minor to determine whether he or she was suitable for commitment to the CYA, and the court read and considered the CYA's report. (*Id.* at p. 57.) Because of the possibility that the minor could be committed to a CYA facility, instead of prison, the Court of Appeal stated that the changes to the law "would operate to benefit, and in effect impose a lighter punishment upon" the defendant. (*Ibid.*) Therefore, the "rationale of [*Estrada*] reasonably applied" and, the court held, the amended statute "shall 'operate in all cases not reduced to final judgment at the time of its passage.' " (*Id.* at p. 59.) Accordingly, the court set aside the judgment and directed the trial court to hold "further proceedings not inconsistent with [the] opinion." (*Ibid.*)

Like the statutory procedure in *Benefield* for evaluating the minor's suitability for CYA placement as opposed to prison, Proposition 57 establishes a procedure for determining whether a minor should be dealt with under the juvenile law or the criminal

law. Although the CYA could have determined that the defendant in *Benefield* was not suitable for CYA placement and the trial court, after holding further proceedings, could have then re-imposed the prison sentence, the defendant was nevertheless entitled to "the punishment-mitigating provisions of" the amended statute. Similarly, although the juvenile court in the instant case might ultimately determine that Alvarez and Gallardo should be dealt with in adult court, they are nevertheless entitled to the punishment-mitigating provisions of Proposition 57.

The Attorney General relies on *Tapia, supra*, 53 Cal.3d 282, and *People v. Brown* (2012) 54 Cal.4th 314 (*Brown*). In *Tapia*, our Supreme Court distinguished statutory changes that redefined criminal conduct or reduced punishment (as in *Estrada*) from new laws that "address the conduct of trials," such as the manner in which voir dire is conducted. (*Tapia*, *supra*, 53 Cal.3d at p. 288.) Conduct-of-trial changes, the court explained, may be applied to trials conducted after the enactment of the statute regardless of when the defendant committed his or her crime. (*Id.* at p. 300.) Thus, the changes in voir dire would apply when, as in *Tapia*, voir dire had not yet commenced, even though the defendant allegedly committed his crime prior to the enactment of the new law. (*Id.* at pp. 286, 299-300.) Applying a new law in this way, the Court explained, was not a retroactive application of the law because the law governs "the conduct of trials which have yet to take place, rather than criminal behavior which has already taken place." (*Id*. at p. 288.)

Here, the transfer hearing provided by Proposition 57 has some characteristics of a conduct-of-trial change in the law; in particular, a transfer hearing will now determine whether the minor's offenses are tried in adult court or adjudicated in juvenile court and, consequently, determine which court's procedures will apply. Nevertheless, the changes wrought by Proposition 57 cannot

reasonably be compared with the changes in voir dire that were discussed in *Tapia*. As set forth above, Proposition 57 will have potentially significant effects on the nature and length of the minor's confinement. As our Supreme Court has observed, "the certification of a juvenile offender to an adult court has been accurately characterized as 'the worst punishment the juvenile system is empowered to inflict.' " (*Ramona R. v. Superior Court* (1985) 37 Cal.3d 802, 810, quoting Note, *Separating the Criminal from the Delinquent: Due Process in Certification Procedure* (1967) 40 So.Cal.L.Rev. 158, 162.) We therefore reject the characterization of Proposition 57 as a change in the law that merely addresses the conduct of trials.

In *Brown*, the Supreme Court addressed an amendment to section 4019, which increased the rate at which prisoners could earn conduct credits for good behavior while incarcerated. The Court acknowledged that the change, if applied to the defendant's time served prior to the amendment, would have effectively reduced his punishment by increasing his credits. (*Brown*, *supra*, 54 Cal.4th at p. 325 ["a convicted prisoner who is released a day early is punished a day less"].) The Court, however, held that the amendment did not apply retroactively, and rejected the defendant's reliance on *Estrada*. "The holding in *Estrada*," the Court explained, "was founded on the premise that ' "[a] legislative mitigation of the penalty *for a particular crime* represents a legislative judgment that the lesser penalty or the different treatment is sufficient to meet the legitimate ends of the criminal law" ' [citation] and the corollary inference that the Legislature intended the lesser penalty to apply to crimes already committed. In contrast, a statute increasing the rate at which prisoners may earn credits for good behavior does not represent a judgment about the needs of the criminal law with respect to a particular criminal offense, and thus does not support an analogous

inference of retroactive intent." (*Brown*, *supra*, 54 Cal.4th at p. 325, fn. omitted.)

Our conclusion is not inconsistent with *Brown*. Here, Proposition 57's punishment-mitigating changes apply only to the particular crimes for which the district attorney could have previously filed charges directly in adult court. (See former Welf. & Inst. Code, §§ 602, subd. (b), 707, subd. (d).) These crimes are enumerated in former Welfare and Institutions Code sections 602, subdivision (b), and 707, subdivision (b). The change in the law is thus not analogous to the change in conduct credit calculations in *Brown*, which applied to post-conviction behavior and regardless of the inmate's underlying criminal conduct. Moreover, the *Brown* Court's reference to " '*a particular crime,*' " does not mean that *Estrada* will apply only if the amendatory law changes only a *single* penal statute. Because Proposition 57 potentially mitigates the punishment for particular crimes committed by minors, its retroactive application is not contrary to the holding in *Brown*.[21]

As noted above, there is a split among the Courts of Appeal as to whether Proposition 57 should be applied retroactively. (See *ante*, fn. 20.) Our holding is consistent with the decision in *Vela*, *supra*, 11 Cal.App.5th 68. To the extent our decision is contrary to the holdings in other cases, we decline to follow them.

---

[21] Alvarez and Gallardo further contend that depriving them of a transfer hearing would deprive them of their constitutional rights to due process and equal protection. Because we conditionally reverse the judgment on other grounds, we do not reach these questions.

DISPOSITION

Our opinion filed November 16, 2016 is vacated.

The judgments are conditionally reversed and the cases remanded for the juvenile court to hold a transfer hearing in accordance with Proposition 57. Upon issuance of our remittitur, the juvenile court shall conduct further proceedings in accordance with Welfare and Institutions Code section 707, subdivision (a), and this opinion.

If the court determines that Alvarez should be transferred to adult court pursuant to Welfare and Institutions Code section 707, the judgment shall be reinstated with the exception that the portion of the judgment imposing and staying the true findings on the lying-in-wait and multiple murder special circumstance allegations under Penal Code section 190.2, subdivision (a)(3) and (15) are stricken. The adult court shall then determine whether Alvarez has been afforded an adequate opportunity to make a record of information that will be relevant to the Board of Parole Hearings as it fulfills its statutory duties in accordance with Penal Code sections 3051 and 4801 and, if not, to allow Alvarez and the People an adequate opportunity to make such a record. If the juvenile court determines that Alvarez should not be transferred to adult court, the court shall hold proceedings to determine the proper disposition pursuant to applicable law.

If, following the transfer hearing or hearings, the court determines that Gallardo should be transferred to adult court, the judgment shall be reinstated with the exception of the parole revocation fine, which is stricken. If the juvenile court determines that Gallardo should not be transferred to adult court, the court shall hold proceedings to determine the proper disposition pursuant to applicable law.

The judgments are otherwise affirmed.

Alvarez's and Gallardo's petitions for writ of habeas corpus are denied.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

JOHNSON, J.

LUI, J.